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No.

Supreme Court, U. S.  
F I L E D

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGP PROPERTIES,  
INC., *Appellants,*

*v.*

THE CITY OF NEW YORK, *et al.*, *Appellees.*

On Appeal from the Court of Appeals  
of New York

**JURISDICTIONAL STATEMENT**

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**JURISDICTIONAL STATEMENT**

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Penn Central Transportation Company, certain of its affiliates and UGP Properties, Inc. (hereafter referred to collectively as "Penn Central") appeal from a decision of the Court of Appeals of New York which holds that Penn Central is not entitled to just compensation for the development rights to the Grand Central Terminal that have been taken from it by operation of the New York City Landmarks Preservation Law.

### OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet officially reported. It is attached as Appendix A.<sup>1</sup> The opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 50 App. Div. 2d 265 and 377 N.Y.S.2d 20 (1975). That opinion, and the accompanying order and findings of fact by the Appellate Division, are attached as Appendix B. The findings of fact and declarations of law, memorandum decision, orders and judgment of the Trial Term of the New York Supreme Court are not officially reported. They are attached as Appendix C.

### JURISDICTION

Penn Central instituted this action as a suit for declaratory and equitable relief and monetary damages in the state courts of New York pursuant to the New York Civil Practice Law and Rules. The final judgment of the New York Court of Appeals, the highest court of the state, was entered on June 23, 1977. The Notice of Appeal to this Court, attached as Appendix D, was filed on September 8, 1977, in the New York Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court: *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Street v. New York*, 394 U.S. 576, 581-85 (1969); *Jamison v. Texas*, 318 U.S. 413, 414 (1943).

<sup>1</sup> All of the Appendices are bound separately and filed together with this Jurisdictional Statement.

### STATUTES INVOLVED

Pertinent portions of the New York City Landmarks Preservation Law, New York City Charter and Administrative Code, ch. 8-A, and applicable New York zoning resolutions are set forth in Appendix E. Pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States are set forth in Appendix F.

### QUESTIONS PRESENTED

Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of "society as an organized entity"?

Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?

Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires

ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?

#### STATEMENT OF THE CASE

In 1967, over the objection of Penn Central, the Landmarks Preservation Commission of the City of New York (hereafter, the "Landmarks Commission") designated the Grand Central Terminal and its site as a "landmark" and a "landmark site" respectively. Under New York City's Landmarks Preservation Law (hereafter, the "Landmarks Law"),<sup>2</sup> no construction on the site and no alteration of the exterior appearance of the Terminal are permitted without prior approval by the Landmarks Commission. (A. 88-90)<sup>3</sup>

The Terminal, located in mid-town Manhattan, was opened for operations in 1913 and serves as the terminus for a number of the operating railroad divisions of the Penn Central. As originally designed in the early 1900's, the Terminal was intended as a combined railroad station and office tower, although the latter was never built. As the Trial Term of the New York Supreme Court found, the Terminal is physically "deteriorating at a substantial rate." (A. 53)

In order to minimize its losses on the Terminal's operations—a goal which increased considerably in importance when the Penn Central was declared bank-

<sup>2</sup> The express purpose of the Landmarks Law is to prevent the "irreplaceable loss to the people of the city" that might be caused by the loss of landmarks. N.Y.C. Admin. Code § 205-1.0(a). (A. 76)

<sup>3</sup> The Landmarks Law provides for criminal sanctions against any person who violates this or other provisions of the statute. N.Y.C. Admin. Code § 207-16.0. (A. 108-09)

rupt on June 21, 1970—Penn Central entered arms-length negotiations with UGP Properties, Inc. (hereafter, "UGP") resulting in a lease under which UGP was to construct an office building on the Terminal site. The lease provided that UGP would pay Penn Central \$1,000,000 per year during construction of the tower; after its completion, Penn Central was guaranteed at least \$3,000,000 per year, and additional amounts based on the total space actually rented. (A. 48) Some existing rental properties would be lost because of construction required for the foundations of the tower.

After a design for the office tower had been completed, and in compliance with the Landmarks Law, Penn Central submitted the design to the Landmarks Commission and applied for a "Certificate of No Exterior Effect," the granting of which would have permitted the office building to be constructed. N.Y.C. Admin. Code § 207-5.0. (A. 90-91) The application was denied on September 20, 1968. Penn Central then applied for "Certificates of Appropriateness," N.Y.C. Admin. Code § 207-6.0 (A. 91-93), submitting its original plan and two revisions as alternatives.<sup>4</sup> The last of these applications was denied on August 26, 1969.<sup>5</sup>

<sup>4</sup> All of the proposed designs submitted to the Landmarks Commission were prepared by the architect Marcel Breuer and were in conformity with the applicable zoning regulations (as distinguished from the Landmarks Law); no variances were required to construct the office tower. (A. 54-55)

<sup>5</sup> The Landmarks Law provides that after a denial of an application either for a Certificate of No Exterior Effect or a Certificate of Appropriateness, certain landmark owners may apply for relief because of insufficient return (defined as less than six percent per

### How the Federal Question Is Presented

By designating Grand Central Terminal and its site as a landmark and a landmark site, the Landmarks Commission imposed a substantial restriction on Penn Central's right to develop the Terminal property. By its subsequent denials of applications for certificates that would have permitted the construction of the proposed office tower, the Landmarks Commission effectively precluded any further development of the Terminal site.

Following the Landmarks Commission's decisions, Penn Central and UGP instituted this action on October 7, 1969. They sought a declaratory judgment, alleging in their complaint that the actions of the Landmarks Commission constituted a taking of private property for public use without just compensation in violation of due process and equal protection of the laws.<sup>6</sup> (A. 4, 61) The Trial Term of the New York Supreme Court agreed, and declared the application of the Landmarks Law to Grand Central Terminal unconstitutional.

The City of New York appealed. The Supreme Court's Appellate Division reversed the trial court, upholding the constitutionality of the Landmarks Law

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year of the property's valuation). This relief was not available to Penn Central, however, because it is not extended to railroad property having partial real-estate tax exemption. N.Y.C. Admin. Code § 207-8.0a(2). (A. 95) As the dissent in the Appellate Division points out, Grand Central is the only such property which has been designated as a landmark. 377 N.Y.S. 2d at 32 (Lupiano, J., dissenting). (A. 30)

<sup>6</sup> Penn Central also sought compensation for the damages caused by the taking. These claims were severed by the Trial Term of the New York Supreme Court and judgment reserved. (A. 60-61)

as applied and finding that there had been no compensable taking. Two of the five justices dissented, essentially adopting the rationale of the Trial Term.

The New York Court of Appeals, the highest court of the state, affirmed the decision of the Appellate Division on the ground that the preservation of landmarks is so socially and culturally desirable that private property taken by governmental regulation to achieve such preservation is not entitled to the same compensation as private property taken for other public uses. (A. 2-3)

The Court reasoned that there was "no constitutional imperative" that a property owner's economic return "embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests." (A. 2) In so doing, the court sought to distinguish the "ingredient of property value" created by "the efforts of the property owner" from the "ingredient" created "by the accumulated indirect social and direct government investment in the physical property, its functions, and its surroundings." (A. 1-2, 9) Because of "the limited purposes of a landmarking statute," the court held that "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (A. 2-3) Considering only this "privately created ingredient," the court held that Penn Central had failed to prove that it was impossible to earn a "reasonable return" on all its properties benefited by the Terminal's operations, even if the Terminal itself "can never operate at a profit." (A. 9)<sup>7</sup>

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<sup>7</sup> In the New York courts, Penn Central presented substantial evidence that it was not now earning, and could not after Grand

The court also reasoned that Penn Central had not been "wholly deprived of the development rights above the Terminal," because those rights had been made "transferable" under certain conditions to other nearby properties.<sup>6</sup> (A. 11) While noting the "many defects" of the City's "transferable development rights" (hereafter, "TDR's") program under the Landmarks Law, and acknowledging that such rights "may not be equivalent in value" to the development rights taken from Penn Central, the court concluded that the TDR's "are valuable" and provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (A. 13-14) Based on the foregoing analysis, the Court of Appeals concluded that the application of the Landmarks Law to the Grand Central Terminal, without just compensation to Penn Central for the development rights taken, was constitutional. This appeal followed.

Central's designation as a landmark earn, a reasonable return on the Terminal. Penn Central does not press that claim in this Court, because this factual question becomes immaterial once the Court of Appeals' error in abandoning the just-compensation rule is recognized.

"Transferable development rights" in theory permit a landmark owner to convey to a limited number of nearby properties the right to develop his own property. The transferee owners, also in theory, are then permitted to build on their properties in a manner that exceeds the otherwise applicable zoning regulations. Under New York City's plan, the TDR's are not created by the Landmarks Law, but by separate zoning resolutions.

The transfer of development rights is permitted in any case to any property owner holding contiguous parcels of land; in the case of landmark owners, the extent to which transfers are allowed is somewhat enhanced. (A. 113-18) *See* Marcus, "Air Rights Transfers in New York City," 36 J.L. Contemp. Prob. 372, 373-75 (1971).

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### I. Probable Jurisdiction Should Be Noted Because of the Pervasive Importance of the Issues Presented and Because of the Novelty of the Decision Below.

Numerous state statutes and municipal and county ordinances have recently been enacted to preserve landmarks deemed to be of historical or aesthetic importance,<sup>7</sup> and the topic has been one of the most

<sup>6</sup> *See* Cal. Pub. Res. Code §§ 5020-42 (West 1977); Conn. Gen. Stat. §§ 147a-m, § 10-321-321g (1977); Ill. Rev. Stat. Ch. 127 § 132.402 (1976 Supp.); Ohio Rev. Code Ann. § 1743.07 (Page 1976); Pa. Stat. Ann. tit., 71 § 104 (Purdon 1977); Va. Code §§ 10-135-150 (1977).

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Santa Barbara County, Cal., Ordinance 1716 (March 21, 1966); Santa Clara County, Cal., Ordinance NS-300.172 (March 20, 1973); Loudoun County, Va., Zoning Ordinance § 750 (1977).

*See generally* Jacob H. Morrison *Historic Preservation Law* (1965 & supp.); *Directory of Landmark and Historic District Commissions*, National Trust for Historic Preservation (1976).

widely discussed subjects in legal literature.<sup>10</sup> Commentators have pointed out that "States and municipalities are presently enacting, at a rapidly increasing rate, statutes to preserve individual historic structures," and that "[o]ver the last decade, American cities have adopted a variety of incentive zoning programs in a determined attempt to expand their leverage over private land use decisions."<sup>11</sup>

Many of these landmarks provisions, including New York City's Landmarks Law at issue here, do not provide for payment of just compensation to owners of structures designated as landmarks. They thus seek to avoid, where government seeks to achieve cultural or aesthetic goals, the constitutional imperative that has long governed the taking of private property for all other public needs.

The issues presented are obviously national in scope, and their resolution will have considerable social and financial consequences both for those who, like the Penn Central, own properties designated as "landmarks" and for the jurisdictions which have enacted

<sup>10</sup> See, e.g., Note, "The Unconstitutionality of Transferable Development Rights," 84 Yale L.J. 1101 (1975); Wolf, "The Landmark Problem in New York," 22 N.Y.U. Intramural L. Rev. 99 (1967); Costonis, "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 Colum. L. Rev. 1021 (1975); Berger, "The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis," 76 Colum. L. Rev. 799 (1976); Marcus, "Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks," 24 Buff. L. Rev. 77 (1973).

<sup>11</sup> Note, "Landmark Preservation Laws: Compensation for Temporary Taking," 35 U. Chi. L. Rev. 362 (1968).

<sup>12</sup> Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv. L. Rev. 574, 575 (1972).

landmark laws. This Court has never intimated, let alone held, that the constitutional requirement of just compensation has diminished application to private property taken to achieve landmark objectives. Indeed, the Court of Appeals, citing no decisions of this Court, noted the absence of "wholly developed principles" and observed that in this area, "[t]he last word has not only not been spoken; it has hardly been envisaged." (A. 14) It is plain, therefore, that this case properly raises substantial constitutional questions which have not been, but should be, decided by this Court.

Penn Central makes no assertion that the preservation of buildings of historical or aesthetic importance is not an appropriate objective of governmental action in pursuit of the public welfare.<sup>13</sup> What is challenged is the novel holding of the court below that landmark preservation statutes somehow present different issues under the Due Process Clause than other compensation cases previously decided by this Court. Two aspects in particular of the Court of Appeals decision distinguish it from prior case law on this issue.<sup>14</sup> These

<sup>13</sup> *Berman v. Parker*, 348 U.S. 26 (1954); *Roe v. Kansas*, 278 U.S. 191 (1929); *United States v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896); *Flaccomio v. Mayor & City Council of Baltimore*, 71 A.2d 12 (Md. 1950). All these cases involved a governmental action designed to promote historical or aesthetic values, and all were accompanied by just compensation to the property owner in question. In particular, this Court stressed in *Gettysburg Electric Ry.* that because such compensation had to be paid, "there is not much ground to fear any abuse of the [government's] power." 160 U.S. at 680. Abuse has, however, occurred here, precisely because the eminent domain power has been ignored and just compensation refused.

<sup>14</sup> While the court below asserts as a constitutional conclusion that in this case "there is no taking" (A. 5), its entire opinion rests on its acknowledgment that a valuable property right has

two interrelated holdings, if allowed to stand, would carve out substantial exceptions from the protection of the Due Process Clause.

First, the decision below excepts "landmarks laws" from longstanding Due Process Clause analysis. It creates a special constitutional category "for the limited purposes of a landmarking statute." (A. 2-3) The Court of Appeals explicitly stated that, when a landmark statute's provisions are applied to private property, "just compensation" to the property owner is not required. The court said "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return," even though that ingredient could not be isolated or measured and the rate-of-return concept defied rational application. (A. 2-6)<sup>15</sup>

Not surprisingly, no authority whatever is cited to support this "reasonable return on private ingredient of value" standard that permits "landmarks" to be treated differently from other kinds of property for purposes of the Due Process Clause. *See Benenson v.*

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been taken from Penn Central. That such right has been extinguished and not been transferred to some other owner is constitutionally immaterial. *Cf. United States v. Causby*, 328 U.S. 256 (1946).

Similarly, the Court of Appeals' statement that the Landmarks Law is an exercise of governmental "regulation" rather than a resort to eminent domain (A. 1) is merely conclusory. As just noted, the court below clearly recognized that Penn Central had been deprived of an important interest in its property; the characterization of the Landmarks Law as "regulation" is indicative only of the court's result, not its reasoning, and is not determinative of whether Penn Central is entitled to just compensation for the value of that interest.

<sup>15</sup> The court acknowledged that the so-called public and private contributions were "inseparably joint" (A. 9), and that the concept of "reasonable return" is "elusive," "incapable of easy definition" and involves an "obvious" and "inevitable circularity of reasoning." (A. 6) (See note 5, *supra*, p. 5-6).

*United States*, 548 F.2d 939, 212 Ct. Cl. (1977). In other cases where property rights are taken, compensation has been required whether or not any remaining property interest can still earn a "reasonable return." *Griggs v. Allegheny County*, 369 U.S. 84 (1972); *United States v. Causby*, *supra*, 328 U.S. at 262; *Portsmouth Co. v. United States*, 260 U.S. 327 (1922). The reliance of the court below on its conclusion that Penn Central failed to show that the Terminal and surrounding properties were incapable of earning a reasonable return is, therefore, totally contrary to this Court's prior decisions.

Significantly, because of the construction given to the Landmarks Law by the Court of Appeals, holding that "[t]his is not a zoning case" (A. 4), this case may properly be distinguished from decisions of this Court involving zoning laws such as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The court below also distinguished this case from "landmark regulation of historic districts." (A. 5) As in the case of zoning, property owners in historic districts benefit "from the furtherance of a general community plan," whereas "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan." *Id.*

Second, the effort by the court below to limit compensation to that portion of value created solely by "private" efforts is equally novel. It expressed the view that

"there is no constitutional imperative that the return [to a property owner] embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which property rests." (A. 2)

It said further that "society . . . has created much of the value of the terminal property" (A. 7) by the "accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings." (A. 1-2) This analysis of "property" was used by the court below to support its conclusion that there was no requirement that Penn Central receive just compensation when application of the Landmarks Law precluded further development of Grand Central Terminal.

In *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), this Court defined property as

"the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The court below has substantially altered this accepted understanding of "property" by artificially dividing it into "privately created ingredients" and "socially" created ingredients. (A. 1-3) This confiscation of property values by reference to the undefined (and in fact undefinable) "social complex" in which the property rests is a principle that cannot be contained.<sup>16</sup> The

<sup>16</sup> The court below acknowledged that "It may be true that no property has economic value in the absence of the society around it. . . ." It found it persuasive, however, that this truism is "much more true . . . of a railroad terminal." (A. 7)

The Court of Appeals ignores the historical fact that Penn Central's development of the air rights over its sunken railroad tracks made Park Avenue "one of this nation's most prestigious residential communities," 377 N.Y.S.2d at 25 (A. 20), thus directly contributing to the present high land values near the terminal.

Moreover, appellant UGP is neither a railroad nor a railroad terminal. It has never received any of the "favours" from society

rationale of the court below could be extended to every form of property, leaving the Due Process Clause a meaningless and ineffectual restriction on government." No property, real or personal, is an island to itself. Its value must reflect the relevant environment, including social and governmental forces. What the court below has reasoned with respect to the Grand Central Terminal applies equally to a private residence taken for a city park or a farm taken for an interstate highway.

The novelty and reach of the principles enunciated by the court below thus warrant review by this Court.

## II. The Decision Below Conflicts with Prior Decisions of This Court Under the Due Process Clause

By enacting the Landmarks Law, New York City has attempted to prevent the "irreplaceable loss to the people of the city" that might occur if landmarks were destroyed. N.Y.C. Admin. Code § 205-1.0(a). (A. 76) It may be, as the Landmarks Commission has determined, that Grand Central should be preserved in its "pristine" form for the people of New York. The effect of the decision by the court below, however, is to force Penn Central to bear the entire cost of such preservation, from which the rest of society benefits. Significantly, the court below acknowledged that, unlike zoning regulations, (*see* p. 13, *supra*) the

ascribed to the railroad. The opinion below does nothing to explain why UGP can be denied just compensation for the extinguishment of its leasehold interest.

<sup>17</sup> As Mr. Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), "the natural tendency of human nature is to extend the [police power] . . . more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

"burden" of a landmark designation "is borne by a single owner" and thus resembles "discriminatory" zoning restrictions that are properly condemned. (A. 5-6) The effect on Penn Central is, therefore, precisely the same on the property owner as in the paradigm use of eminent domain—one owner's property is taken for the benefit of the rest of society. The Terminal is confined to its 1913 dimensions in order to enhance the enjoyment of all who may view it—both New Yorkers and those who visit—and for the benefit of surrounding office towers.

Prior decisions of this Court, considering government conduct trenching on private-property rights, have made it plain that New York City's actions—"freezing" Grand Central in its present form and precluding its development without providing just compensation to the Penn Central—are constitutionally impermissible. In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that

"[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The *Armstrong* decision thus echoed the rationale expressed years ago in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893), that the right to just compensation for a taking "prevents the public from loading upon one individual more than his just share of the burdens of government . . . ." See also *Richards v. Washington Terminal Co.*, 233 U.S. 546, 557 (1914).

The Court of Appeals attempts to elide these considerations by discussing, in a somewhat obscure fashion, the "transferable development rights" ("TDR's") created by the New York City zoning resolutions. (See p. 8, *supra*.) Whatever role the TDR's may play in the reasoning of the court below,<sup>18</sup> they do not constitute just compensation for the Terminal development rights taken from Penn Central by the Landmarks regulation.

As the court below concedes, the value of the TDR's, if any, is highly speculative and uncertain. The court discussed at length the "many defects" in New York's TDR program, noting that the area in which transfers are permitted is "severely limited," and that "complex procedures are required to obtain a transfer permit." (A. 11) The court also conceded that the TDR's "may not be the equivalent in value to development rights on the original site."<sup>19</sup> (A. 12) In fact, as noted *supra*, p. 8 n.8, because the transfer of development rights is already permitted to a certain extent, landmark TDR's represent at best a marginal enhancement in the landmark owner's position as compared to that of other property owners.<sup>20</sup>

<sup>18</sup> The court first asserts that such TDR's "may be considered" in "computing return" on the remaining property held by Penn Central (A. 2), presumably in support of the view that such return, rather than compensation, is all that is required in landmark regulation. Later the court is emboldened to say that, with all their deficiencies, these TDR's may discharge the constitutional requirement of compensation for the taking of the Terminal development rights. (A. 13-14)

<sup>19</sup> The Court of Appeals thus does not appear to dispute the proposition that the development rights are valuable interests.

<sup>20</sup> Moreover, the TDR's representing air rights over the Terminal cannot be transferred as a unit (because of zoning restrictions)

In short, Penn Central must bear the risk of realizing any value through the transfer of the development rights, without regard to whether or not the price it ultimately receives for them is economically equivalent to the rights lost to it. The appropriate constitutional standard not only requires such equivalence but also certainty of payment.<sup>21</sup> Here, the value lost is clearly established by the terms of the parties' lease agreement (*see* p. 5, *supra*). Only compensation in that amount would put Penn Central "in as good position pecuniarily as if [its] property had not been taken." *United States v. General Motors, Corp.*, *supra*, 323 U.S. at 379. What Penn Central has lost in value is not even coincidentally related to the highly speculative (and procedurally encumbered) value of the TDR's.

The TDR's thus fall far short of being "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 326.<sup>22</sup> The court below, in an earlier case, described TDR's as having an "uncertain and contingent market value" that "did not adequately preserve" the value of

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to a single parcel of land. They must be "broken up" and sold in smaller amounts, thus increasing both the economic risks to Penn Central and the transaction costs involved, and thereby lowering the value of the TDR's still further.

<sup>21</sup> *Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 408 (1878). *See also* *United States v. Miller*, 317 U.S. 369, 374-75 (1943); *McCandless v. United States*, 298 U.S. 342, 345-46 (1936); *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 328-29.

<sup>22</sup> *See also* *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-51 (1974); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller*, *supra*, 317 U.S. at 373; *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 242 (1897).

the rights taken by landmarks regulation. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 591, 385 N.Y.S.2d 5, 7, *appeal dismissed*, 429 U.S. 990 (1976). *See* Note, "The Unconstitutionality of Transferable Development Rights," 84 *Yale L. J.* 1101, 1110-11 (1975). Placing the risk of obtaining "just" compensation on the property owner does not satisfy the guarantee of the Due Process Clause. When the government takes property, it is the government that must see to the compensation. The City of New York, as the court below recognizes, has simply not fulfilled its constitutional obligations.

\* \* \*

The explanation of the constitutional tour de force attempted by the Court of Appeals may lie largely in the well-publicized financial condition of New York City. After concluding that the Landmarks regulation was constitutional as applied to the Grand Central Terminal, the court observed:

"In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." (A. 14)

Neither affluence nor penury, however, determines the reach of basic constitutional guarantees. As this Court has forthrightly stated, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States v. Cors*, 337 U.S. 325, 332 (1949).

To whatever extent, therefore, that New York City's financial condition may have influenced the drafters of the Landmarks Law or the court below, the objective of such legislation may not be accomplished through unconstitutional means. The right to receive just compensation for private property taken for public use has long been exalted as an essential protection against governmental abuse and discrimination. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871); *United States v. Gettysburg Electric Ry.*, *supra*, 160 U.S. at 680; *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 415. It was in the *Mahon* case that Mr. Justice Holmes observed that the Constitution protects against the disappearance of private property through the unlimited extension of the police power. The City's financial embarrassment, regrettable as it may be, does not warrant the subversion of constitutional guarantees.

# CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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September, 1977

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No.

Supreme Court, U. S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGP PROPERTIES, INC.,  
*Appellants,*

*v.*

THE CITY OF NEW YORK, *et al.*, *Appellees.*

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On Appeal from the Court of Appeals  
of New York

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**APPENDIX TO JURISDICTIONAL  
STATEMENT**

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**APPENDIX A**

STATE OF NEW YORK  
COURT OF APPEALS

No. 273

PENN CENTRAL TRANSPORTATION COMPANY, ET AL.,

and

UGP PROPERTIES, INC., *Appellants,*

vs.

THE CITY OF NEW YORK, ET AL., *Respondents.*

BREITEL, Ch. J.:

In broad terms, the problem in this case is determining the scope of governmental power, within the Constitution, to preserve, without resorting to eminent domain, irreplaceable landmarks deemed to be of inestimable social or cultural significance. In controversy is the constitutionality of regulation which would prohibit appellants, owner and proposed developer of the air rights above Grand Central Terminal, from constructing an office building atop the Terminal.

Undisputed is the principle, rooted in the Due Process Clause of the Constitution, that government may not, by regulation, deprive a property owner of all reasonable return on his property. There are two issues nevertheless. The first is the extent to which government, when regulating private property, must assure what is described as a reasonable return on that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect

social and direct governmental investment in the physical property, its functions, and its surroundings. The second issue is whether above-the-surface development rights, transferable to adjacent sites under the city landmark ordinance, may be considered in computing return on the property when the landmark property and some of the sites to which the rights may be transferred share a common owner.

Plaintiffs, Penn Central Transportation Company and its affiliates, who have a fee interest in Grand Central Terminal, and UGP Properties, Inc., lessee of the development rights over the Terminal, seek a declaration that the landmark preservation provisions of the Administrative Code of the City of New York, as applied to the terminal property, are unconstitutional. They also seek to enjoin defendants, the City of New York and the City Landmark Preservation Commission, from enforcing those provisions against the subject property. Trial Term granted the requested relief, but a divided Appellate Division reversed and granted judgment to defendants. Plaintiffs appeal.

The order of the Appellate Division should be affirmed. Although government regulation is invalid if it denies a property owner all reasonable return, there is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests. So many of these attributes are not the result of private effort or investment but of opportunities for the utilization or exploitation which an organized society offers to any private enterprise, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper. It is enough, for the limited purposes of a

landmarking statute, albeit it is also essential, that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.

Moreover, in this case, the challenged regulation provides Penn Central with transferable above-the-surface development rights which, because they may be attached to specific parcels of property, some already owned by Penn Central or its affiliates, may be considered as part of the owner's return on the terminal property.

Thus, the regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power.

Grand Central Terminal was formally opened to the public in 1913. Undisputed is its architectural, historical and cultural significance (for further detail, see *opn at App Div, 50 AD2d 265, 269*). On August 2, 1967, in accordance with the provisions of the New York City Administrative Code, the Terminal was designated a landmark by the Landmarks Preservation Commission, and the designation was confirmed by the Board of Estimate on September 21, 1967 (see Administrative Code of City of New York, § 207-2.0).

On July 18, 1968, plaintiffs submitted to the Landmarks Preservation Commission an application for a permit to construct the proposed office building, seeking a certificate that the work would have no exterior effect on protected architectural features (Administrative Code, § 207-5.0). The request was denied on September 20, 1968. Then plaintiffs applied to the Commission for a certificate that the proposed building, even if it would have had an

exterior effect, was appropriate to the site (Administrative Code, § 207-6.0). Three separate alternative proposals, each calling for erection of a substantial office building atop the Terminal, were submitted. On August 26, 1969, the certificate of appropriateness was denied. Not involved, because not raised in light of the denial of a certificate of appropriateness, are the plans for the interior of the Terminal. None of these administrative determinations was ever directly challenged in the courts (cf. *Lutheran Church in America v. City of New York*, 35 NY2d 121, 126-128).

Instead, on October 7, 1969, plaintiffs brought this action seeking judicial invalidation of the landmark preservation provisions of the Administrative Code as applied to the Terminal. Plaintiffs also sought damages for a temporary "taking" of property from the time of original designation as a landmark to the time of the requested judicial invalidation. Of course, any so-called temporary "taking" is more accurately described as a deprivation of property without due process of law (*Fred F. French Investing Co. v. City of New York*, 39 NY2d 587, 593-595, app dsmd — US —).

Trial court found the landmark preservation provisions, as applied, constitutionally deficient, but severed the question of damages. As noted, the Appellate Division, with two dissenters, reversed, and granted judgment to defendants.

This is not a zoning case. In many ways, the restrictions imposed on the use of the property are similar to zoning restrictions, but the purposes are different, and in determining whether regulation is reasonable, the purposes behind the regulation assume considerable significance (*id.*, p 596). Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without dis-

crimination except for permitted continuing non-conforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve (see, e.g., *Berenson v. Town of New Castle*, 38 NY2d 102, 109-110; *Matter of 113 Hillside Ave. Corp. v. Zaino*, 27 N.Y.2d 258, 262-263).

Nor does this case involve landmark regulation of a historic district. Historic district regulation, like zoning regulation, may be designed to maintain the character, both economic and esthetic or cultural, of an area (see *Maher v. City of New Orleans*, 516 F2d 1051, esp p 1060, cert den 426 US 905; Opinion of the Justices to the Senate, 333 Mass 773, 778-780). The difference, generally, is that zoning does this largely by regulating construction of new buildings, while historic district regulation concentrates instead on preventing alteration or demolition of existing structures. In each case, owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan.

Nor does this case partake of the principles applicable to a taking in eminent domain. As noted earlier, there is no taking for which just compensation must be paid. And it is the concept of just compensation which is so integrally related to value based on return. Instead, landmark regulation is a limitation on exploitation of property, an attribute shared with the classifications of zoning and historic districting. Yet landmark regulation is different because the burden of limitation is borne by a single owner. He may or may not benefit from that limitation but his neighbors most likely will. In contrast both an owner and his neighbors benefit to some degree and in some manner from zoning and historic districting.

Restrictions on alteration of individual landmarks are not designed to further a general community plan. Land-

mark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble "discriminatory" zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations (see *Udell v. Haas*, 21 NY2d 463, 476-478). There is, however, a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel. Even when regulation is designed to achieve such an acceptable purpose, however, the landowner must be allowed a reasonable return or equivalent private use of his property (cf. *Fred F. French Investing Co. v. City of New York*, 39 NY2d 587, 596, *supra*). That is, in the case of commercial property, the owner must be assured of a continued reasonable return on the property.

Reasonable return, however, is an elusive concept, incapable of easy definition. For the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available. The inevitable circularity of reasoning is obvious (see Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 Col L Rev 799, 818-819). In most landmark cases, however, it is acceptable to use alternative bases of valuation, assessed valuation perhaps, as a basis for determining the reasonableness of return (see Administrative Code, § 207-1.0, subd [v]). At best, the computation is rough and successful if it is fairly approximate. In considering reasonable return the owner's desire to expand the property physically or functionally affects the base upon which the return is to be computed. Again, there may be a circularity of cause and effect.

Grand Central Terminal is no ordinary landmark. It may be true that no property has economic value in the absence of the society around it, but how much more true it is of a railroad terminal, set amid a metropolitan population, and entirely dependent on a heavy traffic of travelers to make it an economically feasible operation. Without people Grand Central would never have been a successful railroad terminal, and without the Terminal, a major transportation center, the proposed building site would be much less desirable for an office building.

Of course it may be argued that had Grand Central Terminal never been built, the area would not have developed as it has. Thus, the argument runs, construction of the Terminal triggered growth of the area, and created much of the terminal property's current value. Indeed, the argument has some validity. But, in reality, it is of little moment which comes first, the Terminal or the travelers. For it is the interaction of economic influences in the greatest megalopolis of the western hemisphere—the Terminal initially drawing people to the area, and the society developing the area with shops, hotels, office buildings, and unmatched civic services—that has made the property so valuable. Neither factor alone accounts for the increase in the property's value; both, in tandem, have contributed to the increase.

Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property. Although recent financial troubles and consequent governmental assistance make the fact more apparent, railroads have always been a franchised and regulated public utility, favored monopolies at public expense, subsidy, and with limited powers of eminent domain, without which their existence and character would not have been possible (cf. *Ball v. New York Cent. R.R.*, 229 NY 33, 43; *Schaght-*

*coke Powder Co. v. Greenwich & J. Ry.*, 183 NY 306, 316). Even in the best of times, railroads were dependent on government-granted monopolies for their rights of way, government grants for their land, and government assistance for such projects as grade crossing eliminations. Railroads were given franchises to use city streets without charge, often to the detriment of neighboring residents and often without leaving the city power to terminate the franchise (cf. *Kellinger v. Forty-Second Street R.R.*, 50 N.Y. 206, 210, 212; *New York Cent. & H.R. R.R. v. City of New York*, 202 NY 212, 221-224). Through the years, Penn Central and its predecessors have benefited mightily from this assistance. Today, government influence is even more pervasive, extending even to the real estate tax exemption enjoyed by Grand Central Terminal itself (Real Property Tax Law, § 489-ff).

Government has aided the Terminal in less direct ways, as well. It is no accident that much of the city's mass transportation system converges on Grand Central. Numerous subways and bus routes pass through or near the Terminal. Without the assistance of the city's transit system, now municipally owned and subsidized, the property, with or without a towering office structure atop it, would be of considerably decreased value. It is true that most city property benefits to some extent from public transportation, but the benefit is peculiarly concentrated and great in the area surrounding Grand Central Terminal.

Absent this heavy public governmental investment in the Terminal, the railroads, and connecting transportation, it is indisputable that the Terminal property would be worth but a fraction of its current economic value. Plaintiffs may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interests but by the people of the city and state through their government. In-

stead, to prevail, plaintiffs must establish that there was no possibility of earning a reasonable return on the privately contributed ingredient of the property's value.

To put the matter another way, the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint, and for most of its existence, made both the Terminal and the railroads of which it was an integral part, a great financial success for generations of stockholders and bondholders. Their investment has long been eliminated or impaired by the recent vicissitudes of the Penn Central complex. It is exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society. A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad. The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely by the society in which it was permitted to evolve.

Plaintiffs contend that the Terminal currently operates at a loss. Even if that be true, it is not of critical importance. What is significant, instead, is whether the property, managed efficiently, is capable of producing a reasonable return. If the courts were forced to look to the property as it is, rather than as it could be, any inadequacy of managers of property could frustrate any land use restrictions.

Perhaps of greater importance, the property may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the Terminal not in operation.

Some of this income must, realistically, be imputed to the Terminal.

The situation is analogous to that of a flagship store in a regional shopping center. The flagship store may not produce enough income to justify its construction or maintenance, but it may draw enough customers into the other, smaller stores, to make its operation worthwhile, and to extract concessions from the owners of the remainder of the center (see *G.R.F., Inc. v Board of Assessors*, 41 NY2d 512, 514). So it is with Grand Central Terminal. The Terminal acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises.

The discussion thus far is in accord with the teachings of *Lutheran Church in America v City of New York* (35 NY2d 121, *supra*). The Lutheran Church, owner of the landmark site, established, as plaintiffs here have not, that economic considerations did not permit maintenance of the landmark building in its existing form (*id.*, p. 132). Moreover, the Lutheran Church was a charitable institution which, over 100 years, did not and could not reap the same pecuniary benefits of massive governmental investment enjoyed by the railroads and Grand Central Terminal. Yet, the regulatory provisions prohibited replacement of the landmark building without any new ameliorative provisions, other than the pre-existing tax-exemption to which it had always been entitled, to assure that the property remained capable of usefulness on a reasonable economic basis. The same problem was reached and discussed in *Matter of Sailors' Snug Harbor v Platt* (29 AD2d 376, esp p 378). In recognizing the invalidity of the landmark regulation as applied to Lutheran Church, however, this court, as had the court in the *Sailors' Snug Harbor* case (*supra*), declined to strike down the landmarks preservation provisions of the city administrative code (*id.*, pp. 131-132). In this case, by contrast, there has been no showing that the property,

owned not by a charitable enterprise but by an entity existing to make a profit, is incapable in its economic context of producing a reasonable return, even if its development is limited.

Moreover, plaintiffs have not been wholly deprived of the development rights above the Terminal. Those rights have been made transferable to other parcels of land in the vicinity, at least eight of them owned by Penn Central, including the sites of the Biltmore, Commodore, Barclay, and Roosevelt Hotels.

The many defects in New York City's program for development rights transfers have been detailed elsewhere (Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv L Rev 574, 585-589). The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison. But the possibility that a better program could have been devised does not preclude analysis and justification of the existing one in this particular application.

That several of the potential receiving parcels are encumbered by long-term leases or currently improved with suitable buildings does not make the development rights worthless. The knowledge that at some future time, when the lease term has run out or the improvements have lost their utility, a larger building could be constructed, should increase the value of the building plot, at least so long as there is a market demand for new construction (see Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Col L Rev 1021, 1067).

Moreover, in this case, construction of new office buildings was at least given serious consideration on two of the available receiving parcels, the sites of the Biltmore and Roosevelt Hotels. Defendants contend that the alternative sites, and particularly the Biltmore site, are better suited for office building construction than even the Terminal site. But that is beside the point. Important instead is the availability of receiving parcels, in common ownership with the landmark site, on which the development rights, or some of them, could be used. It is significant, as well, that the challenged regulation permitted splitting of the development rights among several receiving parcels, to allow optimal use of the rights.

Development rights, once transferred, may not be equivalent in value to development rights on the original site. But that, alone, does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process. The compensation need not be the "just" compensation required in eminent domain, for there has been no attempt to take property (see *Fred F. French Investing Co. v City of New York*, 39 NY2d 587, 595, *supra*; cf. Costonis, "Fair" Compensation and the Accommodation Power, 75 Col L Rev 1021, 1061-1070, *supra*).

The case at bar, like the *Fred French* case (*supra*), fits neatly into this analysis. In *Fred French* the development rights on the original site were quite valuable. The regulations deprived the original site of any possibility

of producing a reasonable return, since only park uses were permitted on the land. And, the transferable development rights were left in legal limbo, not readily attachable to any other property, due to a lack of common ownership of the rights and suitable site for using them. Hence, plaintiffs were deprived of property without due process of law. The regulation of Grand Central Terminal, by contrast, permitted productive use of the Terminal site as it had been used for more than half a century, as a railroad terminal. In addition, the development rights were made transferable to numerous sites in the vicinity of the Terminal, several owned by Penn Central, and at least one or two suitable for construction of office buildings. Since this regulation and substitution was reasonable, no due process violation resulted.

To recapitulate, a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment. And, even as to the privately created ingredient of the property's value, a plaintiff seeking to show that an otherwise reasonable land use regulation constitutes a deprivation of due process of law must demonstrate affirmatively that the regulation eliminates all reasonable return (see *Mary Chess, Inc. v City of Glen Cove*, 18 NY2d 205, 209-210; *Shepard v Village of Skaneateles*, 300 NY 115, 118). Plaintiffs in this case have failed to meet that burden. In none of their analyses do they include the benefits provided to Penn Central's varied real estate holdings by the Terminal's operation. These real, albeit indirect, benefits alone might suffice to provide Penn Central with a reasonable return. But there is more. The development rights above Grand Central Terminal have been made transferable, and could be transferred to several sites owned by Penn Central and suitable for office building construction. These substitute rights are valuable, and provide significant, perhaps "fair", compensation for the loss of rights

above the Terminal itself. Hence, no constitutional violation has been established.

In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future. The landmark preservation provisions of the Administrative Code represent an effort to take a middle way (Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buff L Rev 77, 78, 107-110). The statute needs improvement. In some cases it protects property owners inadequately (*Lutheran Church in America v City of New York*, 35 NY2d 121, *supra*). But, in its generality and as applied to Grand Central Terminal, the statute does not deprive plaintiffs of due process of law.

In concluding the analysis, it is recognized that one does not pursue a path guided by ample precedent or wholly developed principles. The area is not merely difficult; it has at present viewing impenetrable densities. The last word has not only not been spoken; it has hardly been envisaged. For this case, and for the cases which may follow in its wake, deference to the unknown must be accorded. Moreover, the analysis has not been one which had been fully developed in the valuable presentations by counsel either at nisi prius, the Appellate Division, or in this court. In fairness then, and in order to assure that the better application of the rule be evolved, if counsel be so advised, they should be entitled to present at nisi prius any additional submissions which, in the light of this opinion, may usefully develop further the factors discussed. On the present record, however, the result directed by the Appellate Division is correct and in accordance with the views expressed in this opinion.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Breitel, Ch.J. All concur.

Decided June 23, 1977

## APPENDIX B

(1)

Supreme Court, Appellate Division, First Department

Dec. 16, 1975

PENN CENTRAL TRANSPORTATION COMPANY et al., *Plaintiffs-Respondents*,

v.

The CITY OF NEW YORK and the Landmarks Preservation Commission of the City of New York, *Defendants-Appellants*.

Before STEVENS, P. J., and MARKEWICH, KUPPERMAN, MURPHY and LUPIANO, JJ.

MURPHY, *Justice*.

Defendants have thus far been more successful, at the appellate level, in repelling a direct frontal attack on the constitutionality of the New York City Landmarks Preservation Law (New York City Charter and Admin. Code, ch. 8-A) than in applying it to a given factual situation. (*Cf. Lutheran Church v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305; *Mtr. of Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314.) A majority of us now feels that the time for its full implementation has arrived.

The specific issue presented in this case is whether, as applied to these plaintiffs, the City's Landmarks Preservation Law and the action of defendants thereunder with respect to certain property commonly known as the Grand Central Terminal are unconstitutional. Trial Term responded affirmatively on the grounds that plaintiffs' private

property was taken for public use without just compensation and that they were deprived of due process and equal protection of the laws. We disagree.

In recent years, as we have become painfully aware that "the frontier" has been disappearing and our natural resources are rapidly being depleted, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

These changing attitudes now acknowledge that "[u]rban landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard. Over fifty per cent of the 12,000 buildings listed in the Historic American Buildings Survey, commenced by the federal government in 1933, have been razed. The threat to the remainder continues undiminished as the recent loss of Chicago's Old Stock Exchange and the precarious status of New York's Grand Central Terminal attest. If this trend is not reversed the nation at its bicentennial in 1976 will mourn the loss of an essential part of its architectural and cultural heritage rather than celebrate the visible evidence of its past." (*The Chicago Plan: Incentive Zoning and The Preservation of Urban Landmarks*, 85 Harv.L.Rev. 574-5.)

Since 1966 Congress has passed major new laws furthering historic preservation. (See Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law & Cont. Prob. 314.) The National Historic Preservation Act of 1966 found and declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." (16 U.S.C. § 470(b).)

Though "fraught with trouble" (*Lutheran Church v. City of New York*, 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 15, 316 N.E.2d 305, 311), the preservation of landmarks in urban areas is of special importance. Great cities have always been

havens for educational and cultural activities. New York's rich history is reflective of the great deal of time, money and talent invested in building its own architectural heritage. Structures such as the Brooklyn Bridge, the Metropolitan Museum of Art, the New York Public Library and Grand Central Terminal are important and irreplaceable components of the special uniqueness of New York City. We have already witnessed the demise of the old Metropolitan Opera House (see *Matter of Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700) and the original Pennsylvania Station. Stripped of its remaining historically unique structures, New York City would be indistinguishable from any other large metropolis.

Following the evolving national trend, New York City, in 1965 provided for landmark preservation by adding Chapter 8-A to its Administrative Code, pursuant to enabling legislation adopted by the State nine years earlier (former Gen. City Law, § 20(25-a), now Gen.Mun.Law, § 96-a.) The Council "declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people"; and established, as the purpose of the chapter, *inter alia*: "the protection, enhancement and perpetuation of such improvements and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history," the safeguarding of "the city's historic, aesthetic and cultural heritage", the fostering of "civic pride in the beauty and noble accomplishments of the past," the protection of "the city's attractions to tourists and visitors" and the promotion of "the use of historic districts and landmarks for the education, pleasure and welfare of the people of the city." (Admin. Code, § 205-1.0.)

Briefly stated, the Landmarks Preservation Law provides for the establishment of a commission which, after a public

hearing, proposes to the Board of Estimate the designation of landmark properties and historic districts. The Board approves, disapproves or modifies the designation after receipt of a report from the City Planning Commission. (*Id.*, § 207-2.0.)

Once a landmark is so designated it must be kept "in good repair" (*Id.*, § 207-10.0) and any alteration, construction or demolition of an improvement on the site is regulated. (*Id.*, § 207-4.0.) Comprehensive procedures are provided for changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be such exterior effect, a "certificate of appropriateness." (*Id.*, §§ 207-5.0—207-7.0.) There is also a procedure for seeking a certificate of appropriateness on the ground of insufficient return in the case of taxpaying commercial properties; and a similar procedure, but a different form of relief, for certain tax exempt properties used for charitable purposes. (*Id.*, § 207-8.0.)

Related to the Landmarks Preservation Law are certain amendments to the New York City Zoning Resolution which permit the transfer of unused development rights over landmark properties located in certain high density areas of the City to other nearby sites. (Zoning Resolution, Sections 74-79 to 74-793.)

Grand Central Terminal is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents. The Terminal as a whole includes a variety of architectural and engineering elements: railroad tracks and platforms; space and facilities for marshalling and handling railroad equipment; passage-ways and ramps affording access to adjacent streets, office buildings and subway stations; and concourses for the use of passengers and pedestrians passing through the Terminal. The Main Con-

course, probably the Terminal's most striking feature, is a large room  $120 \times 375$  feet, with a ceiling 125 feet high at its apex.

From its formal opening to the public in 1913 (as a replacement for the "Grand Central Depot" built by Cornelius Vanderbilt in 1871) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design. The complete submergence of all the tracks and a double level track system not only resulted in the accommodation of more trains without the acquisition of more land, but permitted construction of revenue-producing buildings on air rights over the railroad tracks and the development of Park Avenue as one of this nation's most prestigious residential communities. (See, *Grand Central Terminal and Rockefeller Center: A Historical Critical Estimate of Their Significance*, by Fitch and Waite, published by the New York State Parks and Recreation Division for Historic Preservation [1974].) Today, although somewhat neglected over the years, Grand Central Terminal still remains a splendid edifice and a major part of the cultural and architectural heritage of New York City.

On August 2, 1967, after a public hearing and over objection of plaintiff Penn Central Transportation Company ("Penn Central"), the Landmarks Preservation Commission proposed the designation of Grand Central Terminal as a landmark, predicated on the following findings:

"On the basis of a careful consideration of the history, the architecture and other features of this building the [Commission] finds that Grand Central Terminal has a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City.

"The Commission further finds that, among its important qualities, Grand Central Terminal is a magni-

ficent example of French Beaux Arts architecture; that it is one of the great buildings of America, that it represents a creative engineering solution of a very difficult problem, combined with artistic splendor; that as an American Railroad Station it is unique in quality, distinction and character; and that this building plays a significant role in the life and development of New York City."

It is worthy of note, in such connection, that the Amtrak Improvement Act of 1974 (88 U.S.Stat. 1526), in accordance with the Congressional declaration that it is national policy to preserve historic sites, seeks to encourage the preservation of passenger railroad terminals of special significance and architectural quality, such as Grand Central Terminal, by authorizing the Secretary of Transportation to provide them with financial and other assistance. (49 U.S.C. § 1653.)

Plaintiff Penn Central (including, for the purposes hereof, its subsidiaries plaintiffs The New York and Harlem Railroad Company and The 51st Street Realty Corporation) is the successor to the New York Central Railroad Company and the Pennsylvania Railroad. Plaintiff UGP Properties, Inc. ("UGP"), which was incorporated after the landmark designation here in issue, is a wholly-owned subsidiary of a British company.

Penn Central's losses over the last several years brought it to insolvency and bankruptcy. In order to minimize such losses and provide offsetting revenues, it entered into a lease with UGP in January, 1968, pursuant to which UGP was to erect a tower exceeding 50 stories over the Terminal. UGP undertook to pay to Penn Central \$1,000,000 per year during construction and thereafter an amount that was guaranteed to equal not less than \$3,000,000 annually. In addition, UGP assumed a portion of Penn Central's real estate taxes estimated at \$578,500. These rental payments were to be offset in part by the elimination of approximately

\$700,000 to \$1,000,000 in net rents presently received from concessionaires whose space would be occupied by the proposed new building. Commencing in July, 1968, plaintiffs submitted several building designs prepared by the architectural firm of Marcel Breuer & Associates to the Landmarks Commission (called Breuer I, Breuer II and Breuer II Revised) and requested an appropriate certificate (of no exterior effect or of appropriateness). Plaintiffs appear to have indicated a preference for Breuer II Revised, which would have preserved the Terminal's Main Concourse, but not its famous south facade. On August 29, 1969, a certificate of appropriateness was denied.

Since Grand Central Terminal receives partial real estate tax exemption (Real Property Tax Law, § 489-ff), no further administrative remedy, in the form of relief on the ground of economic hardship, was available to it. (Admin. Code, § 207-8.0.) The instant action, seeking declaratory and injunctive relief from the Landmarks Law, on its face and as applied, as well as compensation for the temporary taking (between the landmark designation and its expected judicial invalidation), was commenced. The trial court severed the cause of action for damages and, as above indicated, entered judgment declaring the Landmarks Law, as applied to plaintiffs, unconstitutional and permanently enjoined defendants from acting thereunder to prevent the construction of a lawful improvement on the terminal site. For the reasons hereinbelow stated, such determination should be reversed.

Although the apparent basis for the Trial Judge's decision is the found presence of "such elements as economic hardship, lack of compensatory alternative to alleviate economic hardship, inadequacy of relief by tax rebate, etc., etc.", the rationale would seem to be stated in the penultimate paragraph of his opinion:

"The point of decision here is that the authorities empowered to make the designation may do so but only

at the expense of those who will ultimately have to bear the cost, the taxpayers."

Such language suggests (in accordance with the interpretation by the court below of the holding in *Lutheran Church v. City of New York*, *supra*) that any regulation of private property to protect landmark values constitutes a compensable taking. Such holding would surely, as the *amicus* brief submitted hereon states, "eviscerate New York's Landmarks Preservation Law."

While the line between a compensable "taking" and a noncompensable "regulation" is sometimes difficult to discern, it nevertheless exists. (See, generally, Sax, *Takings And The Police Power*, 74 Yale L.J. 36.)

In *Mtr. of Trustees of Sailors' Snug Harbor v. Platt* (*supra*, 29 A.D.2d at p. 377, 288 N.Y.S.2d at p. 315), we upheld the validity of the Landmarks Preservation Law as "the right, within proper limitations, of the state to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community \* \* \*." And the Court of Appeals concluded that we were "correct in refusing to declare the entire law unconstitutional on its face." (*Lutheran Church v. City of New York*, 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 16, 316 N.E.2d 305, 311.)

The sole question to be decided, then, is whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking. Put another way, while the exercise of the police power to regulate the private use of property is not unlimited, it is for the one attacking such regulation in any given case to establish that the line separating valid regulation from confiscation has been breached.

In reaching such determination, consideration must be given to the importance of the regulation to the public good,

the reasonableness of the regulation in achieving such end and the effect of the regulation on the economic viability of the parcel involved. (*Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130.) We believe the first two requirements are met by the clearly stated purpose of the Landmarks Preservation Law and the unavailability of any reasonable alternative (short of condemnation) for the preservation of a landmark.

The remaining issue is the economic impact of the law on the particular parcel. In *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305, *supra*, the court dealt with a landmark devoted to a charitable use. Adopting a concept first enunciated by this Court (*Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314, *supra*) it applied, as the standard: Does the designation "prevent or seriously interfere with the carrying out of the charitable purpose"? (35 N.Y.2d, at p. 131, 359 N.Y.S.2d, at p. 16, 316 N.E.2d, at p. 311.)

In the instant case, the landmark parcel is not devoted to a charitable purpose; and no claim is made that it cannot be used for its prime function—as a railroad terminal. Accordingly, (and as *Lutheran* implied), the test to be applied is the same as in zoning cases, *i.e.*: Have the plaintiffs demonstrated that the regulation in issue deprives them of all reasonable beneficial use of their property? (*Cf. Williams v. Town of Oyster Bay*, 32 N.Y.2d 78, 343 N.Y.S.2d 118, 295 N.E.2d 788; *Adamo v. Babylon*, 28 N.Y.2d 982, 323 N.Y.S.2d 839, 272 N.E.2d 338; *Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585.)

Plaintiffs' burden, in such connection, is to establish that they are incapable of obtaining a reasonable return from Grand Central Terminal operations, not that they are not receiving it. (*Cf. Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585, *supra*; *Stevens v. Town of Huntington*, 20 N.Y.2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591; *Arverne Bay Construction Co. v.*

*Thatcher*, 278 N.Y. 222, 15 N.E.2d 587.) In our view, such burden has not been met.

To support the claim that it is actually sustaining a loss from Terminal operations, Penn Central submitted a "Statement of Revenues and Costs" for the years 1969 and 1971. These statements, which were prepared for the instant litigation, improperly attribute a considerable amount of railroad operating expenses (and some taxes) to their real estate operations. For example, the expense items included "Station Master and Staff", "Information Clerks" and "Gate Usher". Such huge cost items (for 1971) as "maintenance, repairs and service plant operation" (\$1,141,679), "cleaning" (\$632,753), "policing" (\$438,566), "materials and supplies" (\$69,692), and "utilities" (\$660,710) were related to the entire terminal operation and not segregated as between the railroad and real estate portions thereof.

Moreover, and to compound the error, no rental value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes. (*Cf. Matter of Seagram & Sons v. Tax Comm. of City of N. Y.*, 14 N.Y.2d 314, 251 N.Y.S.2d 460, 200 N.E.2d 447.) Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal (including trackage, platforms, concourse, waiting rooms, ramps, ticket windows and public amenities) for such service. The reasonable rental value of such space cannot properly be omitted from any meaningful analysis of the property's capacity to yield a reasonable return.

Obviously, if the entire expense of operating a railroad terminal is offset only by non-railroad rents generated by the commercial and concession use thereof, even the most profitable terminal will show a "deficit".

Additionally, on the record before us, plaintiffs have failed satisfactorily to show (a) an inability to increase the Terminal's commercial income by transforming vacant or under-utilized space to revenue-producing use, or (b) that

unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites (see, New York City Zoning Resolution, Sec. 74-79 *et seq.*), or (c) that Penn Central's agreements with the Metropolitan Transportation Authority and the Connecticut Transportation Authority provide a basis for invalidating the Terminal's landmark designation.

Finally, the assertion that the Landmarks Preservation Law unconstitutionally discriminates against Penn Central because, as the recipient of partial tax exemption, it is ineligible for statutory hardship relief, has already been disposed of by us. On an analogous claim in a comparable situation we hold "that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief in the situation covered by the statute, but not restricting the court from so doing in others." (*Mtr. of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, p. 378, 288 N.Y.S.2d 314, p. 316, *supra*.)

To summarize, in view of the nationwide "burgeoning awareness that our heritage and culture are treasured national assets" (*Maher v. City of New Orleans*, 5 Cir., 516 F.2d 1051, 1060), New York City's Landmarks Preservation Law is a valid exercise of its police power. The need to preserve structures worthy of landmark status is beyond dispute; and the propriety of the landmark designation accorded Grand Central Terminal is essentially unchallenged.

Plaintiffs' burden of proving the statute unconstitutional, as applied to them, is exceedingly heavy (*Cf. I.L.F.Y. Co. v. City Rent and R. Admin.*, 11 N.Y.2d 480, 230 N.Y.S.2d 986, 184 N.E.2d 575; *Wasmuth v. Allen*, 14 N.Y.2d 391, 252 N.Y.S.2d 65, 200 N.E.2d 756); and, on the instant record, has not been met. At best, they have shown that they have been deprived of the property's most profitable use. But that is not the constitutional test. (*Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130;

*United States v. Central Eureka Mining Co.*, 357 U.S. 155, 77 S.Ct. 1097, 2 L.Ed.2d 1228.)

The validity of the Landmarks Preservation Law, as applied to Grand Central Terminal, does not depend on a showing that the landmark parcel will be undiminished in any degree by the regulation's restrictions; only that it will not "deprive the individual property owner 'of all beneficial use of his property' \* \* \*." (*Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, at p. 225, 325 N.Y.S.2d 933, at p. 937, 275 N.E.2d 585, at p. 588, *supra*.)

In short, "[p]laintiffs have shown hardship but not confiscation." (*Mary Chess, Inc. v. City of Glen Cove*, 18 N.Y.2d 205, 210, 273 N.Y.S.2d 46, 49, 219 N.E.2d 406, 409.) But such hardship, in the proper exercise of the City's police power, must be subordinated to the public weal, since such regulatory authority is not only "the least limitable of all the powers of government" (*Matter of Englesher v. Jacobs*, 5 N.Y.2d 370, 373, 184 N.Y.S.2d 640, 642, 157 N.E.2d 626, 627, cert. den., 360 U.S. 902, 79 S.Ct. 1286, 3 L.Ed.2d 1255), but it "is not to be limited to guarding the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty." (*Barrett v. State*, 220 N.Y. 423, 428, 116 N.E. 99, 101.)

In light of the foregoing, the order and judgment of Supreme Court, New York County, entered, respectively, on January 21, 1975 and February 4, 1975, and all findings of fact and declarations of law inconsistent herewith, should be reversed, on the law and the facts, said order, judgment and findings vacated, and judgment entered declaring that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them, with costs.

Order and judgment, Supreme Court, New York County, entered on January 21, 1975 and February 4, 1975, and all

findings of fact and declarations of law inconsistent with the Opinion of this Court, reversed, on the law and the facts, said order, judgment and findings vacated, and judgment directed to be entered declaring that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them. Appellants shall recover of respondents \$60 costs and disbursements of these appeals.

All concur, except MARKEWICH and LUPIANO, JJ., who dissent in an Opinion by LUPIANO, J.

Settle order on notice providing, inter alia, for new findings of fact consistent with the Opinion of this Court.

LUPIANO, *Justice* (dissenting):

The historical, aesthetic and cultural significance of Grand Central Terminal is not disputed. Similarly, the contribution of the Terminal to the uniqueness of New York City is not subject to polemics. Thus, the designation of Grand Central Terminal as a Landmark under the Landmarks Law of New York City is easily countenanced. However, the sole issue to be decided on this appeal is, as aptly phrased by Justice Murphy: "whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking". Such issue narrows down to the impact of the Landmarks Preservation Law on the particular parcel.

Plaintiff Penn Central Transportation Company ("Penn Central") has a three-hundred year lease for the Terminal. Plaintiff The New York and Harlem Railroad Company is 95% owned by the Trustees of Penn Central and is the owner of the fee. The 51st Street Realty Corporation is also a subsidiary of the Penn Central. Subsequent to the designation of the Terminal as a Landmark, agreements were entered into between Penn Central and UGP Properties,

Inc. ("UGP") under date of January 22, 1968, whereby UGP was to erect an office building, in keeping with applicable zoning laws, in and above that part of the Terminal space now occupied by the waiting room and shops along 42nd Street. UGP engaged the renowned firm of Marcel Breuer & Associates to prepare architectural designs. That firm, winner of many awards for architectural distinction (*e. g.*, awards for the Whitney Museum and the H.U.D. Headquarters Building in Washington, D.C.), designed a high-quality building in compliance with the zoning laws which would not alter the Main Concourse or any other part of the Terminal actually used in railroad operations, would provide ample access for pedestrians and, most significantly, would preserve the facade of the Terminal building (Breuer Plan I). In providing for office building space rising above the present Terminal frontage on 42nd Street and set back some 30 feet from the facade of the present building, this plan constituted a present-day application of a principle which had been embodied in the *original* plans for the present Terminal building. The original plans called for an office building to be erected over the present facade in essentially the same location as is proposed in Breuer Plan I. The difference is that, in keeping with current building capabilities and practices, the Breuer I design calls for a considerably taller building of more modern design. The removal of certain shops and advertising signs on 42nd Street and the creation of a pedestrian arcade, as envisioned by this plan, was recognized by the Landmarks Commission as considerably enhancing, "if sensitively handled, . . . the exterior of Grand Central Terminal by providing a quieter and more dignified base to support the monumental columns that rise from the ramp level. Since the suggested changes in the street level entrances would unquestionably improve pedestrian access to the Terminal and to the subway, these proposals might well be acceptable as a means of perpetuating the use of the Landmark and of protecting its main exterior architectural features". However, Breuer Plan I

was twice rejected by the Commission on applications for a Certificate of No Exterior Effect (Admin.Code § 207-5.0) and for a Certificate of Appropriateness (Admin.Code § 207-6.0) respectively. The Commission in response to the "applicant's claim that the Pan Am Building has already destroyed the silhouette of the south facade and that the proposed tower, with its granite facing, would either provide a better background or that one more tower could not do further damage" opined that the "great mass of the Breuer I tower right on top of the Terminal facade . . . would reduce the Landmark itself to the status of a curiosity". An alternative design which came to be known as Breuer II Revised was also submitted. The major difference between the two plans is that Breuer II Revised does not preserve the south facade of the Terminal building. A Certificate of Appropriateness was similarly denied for Breuer II Revised.

At this point, after denial of a Certificate of No Exterior Effect and a Certificate of Appropriateness, owners of landmarks generally would have had available an important administrative remedy: an application for relief (including ultimately the lifting of the landmark restrictions) on the ground of economic hardship. Such relief is denied with respect to the Terminal and its site, however, because this part of the law is so drawn as to exclude from its applicability property having partial real estate tax exemption under § 489-ff of the Real Property Tax Law, relating to commuter railroad real property (Admin.Code § 207-8.0a[2]). Property exempt under Section 489-ff is one of the few types as to which the Landmarks Law withholds relief and the Terminal is the only 489-ff property which has been designated a Landmark.

As a consequence, plaintiffs commenced the instant action for declaratory judgment which resulted in a judgment of the Supreme Court, New York County (Saypol, J.) declaring that the Landmarks Law of the City of New York and

the actions taken pursuant thereto by the Landmarks Preservation Commission as applied to Grand Central Terminal and its site (a) constitute a taking of private property for public use without compensation, and (b) deny to plaintiffs due process of law and the equal protection of the laws. Trial Term in its memorandum decision quoted at length from the supplemental report of former Associate Judge John Van Voorhis of our Court of Appeals, serving as Special Master in the reorganization proceedings involving The New York, New Haven and Hartford Railroad Company in the United States District Court for the District of Connecticut. The following excerpt from that report is particularly relevant:

"There is, of course, a precedent for this structure in the Pan-American Building located about 200 feet to the north. Whether the opposition to its construction will succeed is not presently known, but it would seem to me, that the probabilities are in its favor. The Grand Central Station is not proposed to be removed. [citation] It is doubtful that the City could insist upon its being maintained at Penn Central's expense as a memorial to the golden age of railroading. The building, as it is, is expensive to maintain, and even under the broad scope of the police power in modern times it is doubtful that it can be so constricted without there being a taking without payment of just compensation as required by the state and federal constitutions. This is particularly true in view of the similarity and close proximity to the Pan-Am Building which, it might be argued, could constitute discrimination denying the equal protection of the law."

Also of particular relevance are the following findings of fact enunciated by Trial Term:

"9. The Terminal is deteriorating at a substantial rate. The condition of the Terminal was such that repairs

and maintenance work costing approximately \$1,278,135 were necessary in June 1972 . . . . 25. The Terminal site is a valuable location for an office building. It is in the heart of a commercial area occupied mainly by high-rise commercial structures such as office buildings and hotels . . . . 31. *If construction of Brewer I had commenced in 1968, the City could have received substantially increased property taxes from commencement of construction.*" (Emphasis supplied).

After further finding that the proposed venture would have been successful and that substantial sums would have accrued to the respective plaintiffs, Trial Term found:

"36. For the years 1967 to 1971, the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal. 37. The net deficit to Penn Central from operating the Terminal was \$1,165,470 in 1969 and \$1,902,467 in 1971. 38. As of June 1, 1972, the Metropolitan Transportation Authority leased the Terminal and, together with the Connecticut Transportation Authority, receives all revenues from tenants and concessionaires in it (with the exception of any rent Penn Central would receive under its lease with UGP) and has assumed all costs of operating the Terminal. Penn Central is obligated to pay these agencies \$4,500,000 a year for the next five years and \$2,000,000 thereafter. The Metropolitan Transportation Authority received partial reimbursement for these costs from the City."

In light of the agreement which Penn Central found necessary to make with the MTA and CTA and of the maintenance and operating expenses of the terminal far exceeding actual revenues therefrom, it is averred that the denial of the opportunity to profit from the proposed development leaves Penn Central in a position where it cannot make

any return on the Terminal. Put another way, it is plaintiffs' contention that the application of the Landmarks Law to this parcel in the manner described above, effectively deprives them of the reasonable beneficial use of their property and thus amounts to a taking. It is aptly observed in *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 16, 316 N.E.2d 305, 311 (1974) that "(t)he landmark preservation problem has received considerable comment the net effect of which is general agreement that attempts to designate individual landmarks in high economic development areas is fraught with trouble (see, especially, Costonis, *The Chicago Plan: Incentive Zoning And The Preservation of Urban Landmarks*, 85 Harv.L.Rev. 574; Wolf, *The Landmark Problem in New York*, 22 *Intramural L.Rev. of N.Y.U.* 99)." Although title and use remain in the record owner, *Lutheran Church*, *supra* recognized that in a particular case the Landmarks Law may operate to so severely restrict free use as to be confiscatory. Essentially this is the manner in which Trial Term viewed the problem presented by the instant action.

The majority cite specific instances in which plaintiffs are alleged to have erred in attempting to carry the burden of proving a net operating deficit. First, it is asserted that the "Statement of Revenues and Costs" for the years 1969 and 1971 improperly attribute a considerable amount of railroad operating expenses to their real estate operations. Certain substantial cost items for 1971, such as "maintenance, repairs and service plant operation", "cleaning", "policing", "materials and supplies" and "utilities", are criticized for being presented as related to the entire Terminal operation rather than segregated as between the railroad and real estate portions thereof. Patently, the tenants and concessionaires who provide the gross revenues of the Terminal are there because the Terminal is an active railroad station and provides a nexus with public transportation via subway and bus, thus insuring the daily passage of thousands of

people. Pragmatically, these tenants and concessionaires can be attracted and retained if the building is operated as a railroad station and is maintained, cleaned, repaired and policed in all its parts. There is, therefore, a basis for claiming that the expense of operating and maintaining the building is a proper expense in ascertaining the profitability or unprofitability of its operation. The insubstantial nature of the criticisms of the "Statement of Revenues and Costs" is evident because excluding all items the defendants, the City of New York and the Landmarks Preservation Commission, claim should be excluded only reduces the deficit from \$1,902,467 to \$1,089,672. That alone serves to establish the economic burden borne by the Terminal. Further, though difficult to apportion, it may not be gainsaid that the value of the "real estate" aspect of the Terminal is dependent upon the maintenance of the Terminal as an area which will be visited for purposes other than transportation.

It is next claimed that plaintiffs' failure to impute a rental value to the vast space in the Terminal devoted to railroad purposes is an error vitiating plaintiffs' analysis of the property's capacity to yield a reasonable return. As to this contention, the plain answer is that the defendants' reliance on *Matter of Seagram & Sons v. Tax Comm.*, 14 N.Y.2d 314, 251 N.Y.S.2d 460, 200 N.E.2d 447 (1964) is misplaced. This case dealt not with income from a building, but with the determination of its appraisal value on the capitalization-of-rents method. Obviously, under those circumstances, rent had to be imputed to owner-occupied space in order to have something to capitalize for that portion of the building. That, of course, is not the case here which is concerned with whether the owner is making any return from his use of his property. Indeed, the Landmarks Law itself in defining "reasonable return" states that for such purposes "(n)et annual return shall be the amount by which the *earned income* yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year . . ." (Admin.Code § 207-1.0v[3][a]). (Emphasis supplied). As a matter of economic analysis, the

argument treats the Terminal as if someone had made a gift of it to Penn Central. The fact is that Penn Central paid its own money for the Terminal and to the extent it has been "saved" money for Terminal rental, it has lost the interest it would have made if it had never built the Terminal or had sold it. These figures of rent and interest on the value of the property are economic equivalents (See *La Porte v. State of New York*, 6 N.Y.2d 1, 7, 187 N.Y.S.2d 737, 741, 159 N.E.2d 540, 542 [1959], appeal dismissed, 361 U.S. 116, 80 S.Ct. 207, 4 L.Ed2d 154 [1959]; *Albany Country Club v. State of New York*, 37 Misc.2d 134, 144, 235 N.Y.S.2d 684, 694 [Ct. Claims 1962], modified on other grounds, 19 A.D. 2d 199, 241 N.Y.S.2d 604 [3rd Dept., 1963], *affd.*, 13 N.Y.2d 1085, 246 N.Y.S.2d 407, 196 N.E.2d 62 [1963]). Further, it has been held that the imputation of rent does not create income from property as the term is defined by the Internal Revenue Code (*Harper v. Granger*, 99 F.Supp. 216 [W.D. Pa.1951]). In passing, note is taken of plaintiffs' point that it is ironic to have the argument made in this case that the present Terminal should be assigned an enormous rental value because of the rental values for comparable space in mid-Manhattan. Rental values are high in that area in the context of the owners' freedom within the zoning laws to develop their property in profitable ways. At issue here is the application of the Landmarks Law in such manner as to deprive the Terminal of such value. It may well be argued that no one would pay substantial rentals for a lease of the Terminal when told that the *only* use to which he can put it is an unprofitable railroading use. In this sense the value which defendants would have the Court attribute to the property is precisely the value that they have taken away from it.

Next, it is maintained that plaintiffs have failed to satisfactorily show an inability to increase the Terminal's commercial income by transferring vacant or under-utilized space to revenue producing use. In this context it appears that Penn Central has been assiduous in attempting to in-

crease its Terminal income. Indeed, the commercialization of the Terminal had reached such a point that one of the things discussed in the proceedings before the Landmarks Commission was the desirability of eliminating some of the concessions which have disfigured the building. The simple assertion that there is room for development of additional office space, stores or recreational facilities is highly speculative. As to existing leases, there is nothing to suggest that they were not negotiated at arm's length. As to additional development, it is worthy of note that a proposed bowling alley in place of the waiting room failed of approval by the Public Service Commission. Also, a proposed mall failed of accomplishment because of its impingement upon trackage.

Defendants next assert that the claimed hardship based on deferred maintenance expenses, attributable to the Landmarks Law provision (Admin.Code § 207-10.0) requiring Penn Central to maintain the Landmark is spurious. This assertion is seemingly premised on the argument that the Landmarks Law mandates no more than that required by ordinary prudent management for the preservation of the investment. Maintenance is a prerogative of management. To transform that prerogative into a duty is to clearly lessen Penn Central's estate. It is as though a lien is asserted against the property in the amount necessary to maintain the Terminal and it mandates expenditures whether or not justified by the operating statement. Otherwise stated, ownership entitles one to destroy as well as to preserve. Subject to the law of nuisance, *inter alia*, the vehicle of destruction may be neglect. To require maintenance or improvements may be an idea whose time has come, but it may not be required solely of Landmarks, and not in the context of additional burdens or restrictions upon the parcel which on a pragmatic, economic and financial basis cannot be complied with. Though not here in issue, notice may be taken of the fact that criminal penalties attach to the failure to maintain a Landmark.

It is further asserted by defendants that the agreements with the MTA and the CTA referred to above, were improperly found by Trial Term to impose a loss in that Penn Central must pay additional sums to those agencies. Review of the historical background of those agreements impels the conclusion that defendants' contention is without merit. Approximately two years prior to any agreement with the MTA, Penn Central acquired all the assets of the New Haven Railroad, specifically including all the New Haven's interest in the off-Terminal (Park Avenue) properties. For this interest Penn Central was charged more than \$28,000,000. At the same time, Penn Central became responsible for all the operations and operating deficits of the New Haven. Therefore, when Penn Central and the MTA negotiated their agreements, the New Haven was in essence a mere corporate shell. There were no assets of the New Haven to which the MTA could "succeed" and the MTA in fact acquired nothing from the New Haven. Defendants, though acknowledging that all revenue inures to the benefit of the MTA and that all costs are borne by the MTA, aver that the \$2,000,000 credit against expenses incurred is in reality a sum due the MTA as the successor in interest to the New Haven. During the time when the New Haven still held an interest in the off-Terminal properties and their revenues, these revenues had been applied towards off-setting the operating deficits of the Terminal and, if any excess remained, the New Haven asserted a claim to a share of the excess. It was thought equitable for Penn Central to contribute towards the operating deficits of the Terminal an amount roughly equivalent to the part of the off-Terminal revenues which had formerly been applied towards New Haven's share of the Terminal expenses. Penn Central's acquisition of the part of the off-Terminal revenues which was "not excess" was accompanied by its assumption of the very expenses (formerly the obligations of the New Haven) against which the non-excess revenues had been applied. No benefit was derived from the simultaneous acquisition of a debit

and a credit in equal amounts. Thus, the credit of \$2,000,000 provided by Penn Central to the MTA did not come out of the assets of the New Haven to which the MTA had succeeded and the agreements between Penn Central and the MTA delineate that this credit is to come out of Penn Central's own assets and is specifically applied towards operating expenses of the Terminal.

The other credit of \$2.5 Million per year for five years required to be provided by Penn Central in connection with the operation for MTA's account of the Harlem-Hudson Division is not related to the Terminal. The operating agreements were not entered into for the benefit of Penn Central, but for the purpose of maintaining commuter service. While Penn Central may have been able to meet operating deficits, it may also have been able to discontinue commuter service. The \$2.5 Million credit was the price it paid for withdrawal from commuter service. Viewed in this context, the credit is chargeable not to the operation of the Terminal, but to the Penn Central itself. However, this does not alter the fact that the several agreements leave Penn Central with no possible source of return from the Terminal, save development rights.

The majority view the plaintiffs as having failed to satisfactorily show that unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites (see, New York City Zoning Resolution, Secs. 74-79, *et seq.*). The Transfer Resolutions authorize the City Planning Commission to grant special permits, if certain conditions are met, allowing the transfer of development rights from a landmark site to adjacent sites. As originally enacted, they neither provided compensation nor significantly mitigated plaintiffs' harm. Defendants acknowledged that development rights are not *ipso facto* equated with compensation when the Zoning Resolution was amended in 1969 to expand the number of sites that could receive transfers of development rights from the Terminal

site. Moreover, as defendants themselves note, the process of transfer is fraught with obstacles. The City Planning Commission and the Board of Estimate must approve. Neighbors may resort to the courts to protest the erection in their vicinity of a structure which does not comport with the Zoning Resolution. For these and numerous other reasons it is difficult to assign a monetary value to the transfer rights. However, not content with merely asserting the general value of transfer rights, defendants detail the economic benefit to be derived from a transfer to the Biltmore Hotel site. This, of course, requires the demolition of the Biltmore Hotel, a viable profit-making entity and ignores the fact that the vast square footage could not be transferred to any adjacent site, unless the Biltmore site was to be occupied by a 103-story structure. In the context of this discussion, it ill-behooves defendants to in effect control the deployment of the Penn Central's financial resources and usurp its management prerogative. In light of the substantial costs that may attend the transfer of development rights because the Landmark owner must submit a program for continuing maintenance of the Landmark as part of his application for the special permit, the value of the development rights are less attractive.

It is, therefore, concluded on the record herein that plaintiffs have sustained their burden of demonstrating that the Terminal site, as restricted, is incapable of producing a reasonable economic return. Concededly the operation of the Terminal represents an economic hardship. Conjecture that Penn Central could have "done better" may not operate as a talisman in the resolution of this matter. It is only required that Penn Central do the best it can. The possible transfer of development rights cannot be viewed under the circumstances herein as offsetting the restrictions placed on the Terminal site. The benefits to both the City and the citizenry to be derived from the designation of the Terminal as a Landmark are self-evident. Yet in the manner of its

application as delineated above, lies the inequity of this particular case. The Terminal is to be preserved in its pristine state for the benefit of all and the bill for this is presented solely to Penn Central. Assuming the Terminal is and represents all that defendants claim (an assumption easily indulged in), the relevant considerations and circumstances may well warrant resort to the power of eminent domain as an appropriate solution. If for cogent reasons resort to such power is not feasible, defendants may have to forego this particular objective. In this connection, it should be noted that Breuer I appears to be more suited to a compromise of the rival interests of defendants and of plaintiffs. Further, if the power of eminent domain is deemed here inappropriate, society is left with an inchoate right.

At this point the following lengthy excerpt from the Court of Appeals opinion in *Forster v. Scott*, 136 N.Y. 577, 583-585, 32 N.E. 976, 977 (1893) is most apt:

"The constitutional guarantees against the appropriation of private property for public use, except upon just compensation, as well as that against depriving the owner of its enjoyment and possession without due process of law, have been the subject of much judicial discussion in the manifold aspects in which the questions have been presented in the numerous cases. . . . The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectively against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoy-

ment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. (Citations.)

"As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no encumbrance upon it."

Manifestly, the competing meritorious interests of the City and the Landmarks Preservation Commission in seeking to preserve the historical, aesthetic and cultural heritage represented by Grand Central Terminal and the interest of Penn Central as owner in the free use of its property unburdened by restrictions imposed by the former under circumstances and in such manner as to be confiscatory in nature, must be reconciled. It is submitted that given the present economic conditions prevalent in New York City and, indeed in the United States, given the financial situation of Penn Central with due regard for the reasonable

efforts on the part of management to obtain an adequate return on the property at issue, and given the grandeur of the Terminal, somewhat faded in the physical sense but fully vital from an historical and cultural perspective, Breuer I represented a patently good faith effort to do homage to the Terminal within the ambit of its Landmark designation, and at the same time to recognize the prerogative of private ownership and the economic necessities of this commercial parcel.

In the *Amici Curiae* brief submitted on behalf of the Committee to Save Grand Central Station, et al., it is stated that "(r)egulation for the purpose of the preservation of . . . [landmarks] has been upheld in all states where the matter has been tested in court", citing in support of this proposition the following: *City of New Orleans v. Levy*, 223 La. 14, 64 So.2d 798 (1953); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964); *Rebman v. City of Springfield*, 111 Ill.App.2d 430, 250 N.E.2d 282 (1969); *Bohannon v. City of San Diego*, 30 Cal.App.3d 416, 106 Cal.Rptr. 333 (Ct.App. 4th Dist., 1973). A reading of these cases indicates that, with one exception, each case was concerned with the preservation of a district, not an individual parcel. This is so analogous to zoning that the statutory scheme is oft referred to as zoning. The one exception was a prohibition against the erection of any building within 1/4 mile of the town common unless the plans were approved (*Town of Deering ex rel. Bittenbender v. Tibbetts*, *supra*). Again, hardly the sort of taking here present. We refer again to the Court of Appeals decision in *Lutheran Church v. City of New York*, *supra*, wherein it was observed in the able opinion, per Gabrielli, J. that zoning regulation is different than, and not to be equated

with, Landmarks Preservation. Nevertheless, the Court proceeded to demonstrate that even zoning is void if confiscatory. Further, it is confiscatory if it may fairly be stated that the regulation serves to add property remaining in private hands to the government's resources. Citing *Forster v. Scott*, *supra*, the Court also noted that a statute which affects the free use and enjoyment of property or the power of disposition at the will of the owner is "obnoxious to the restraints of the constitution" (*Lutheran Church v. City of New York*, *supra*, 35 N.Y.2d at p. 130, 359 N.Y.S.2d at p. 15, 316 N.E.2d at p. 311). "What has occurred here, however, where the commission is attempting to force plaintiff to retain its property as is, *without any sort of relief* or adequate compensation, is nothing short of a naked taking" (*Lutheran Church v. City of New York*, *supra*, at p. 132, 359 N.Y.S.2d at p. 16, 316 N.E.2d at p. 312.) (Emphasis supplied). It thus appears that Mr. Justice Saypol correctly analyzed the opinion of the Court of Appeals and that severe criticism of the Justice in this respect by defendants is unwarranted. Of particular note is the fact that in *Lutheran Church*, the landowner wished to demolish the mansion which had been designated a Landmark and to accomplish this purpose it was necessary to have the "landmark designation" itself removed. It was "uncontested that the existing building [was] totally inadequate for [the landowner's] legitimate needs and must be replaced if [the landowner] is to be able freely and economically to use the premises especially as it appears that adjoining structures have been integrated with [the landowner's] operation" (*Lutheran Church v. City of New York*, *supra*, at 132, 359 N.Y.S.2d at 17, 316 N.E.2d at 312). However, the declaratory judgment action initiated by plaintiffs herein has its inception not in a desire to demolish the landmark, but rather to alter it; that is, to use it in a manner which will insure a reasonable economic return while preserving the Landmark in a feasible and consonant manner. To phrase it another way: plaintiffs desire to build an office tower *over* the Landmark and

not to remove the Landmark and replace it with such office tower. Consequently, the declaratory relief afforded by the Supreme Court must be viewed as not removing the "landmark designation" from the Terminal, but rather perceived as holding that the manner of applying such designation as above delineated, constitutes a taking of plaintiffs' private property for public use without just compensation. It is beyond cavil that if defendants, especially the Landmarks Preservation Commission, acted favorably in respect of any of the plaintiffs' applications seeking to construct the tower, the instant action would not have been maintained. By virtue of the fact that plaintiffs retained an outstanding architect firm and even submitted Breuer I which retains the famed south facade of the Terminal, their good faith in coming to terms with the landmark designation has been exhibited. The presence of the Pan Am building and the fact that the original plans for the present Terminal envisioned an office tower over such Terminal militate in persuasive fashion against the defendants' intransigent position. In this context, such rigid application of the Landmarks Law designation may well be self-defeating. Self-defeating not only because it calls into question the propriety of such law, but also because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as Landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as Landmarks in the years to come?

Defendants' claim that Trial Term erred in declaring that the Landmarks Law *as applied* to plaintiffs denies them the equal protection of the laws. It will be recalled that Penn Central is precluded from seeking relief available to others because of its receipt of a partial real estate tax exemption. The statutory scheme, without explanation therefor, treats differently three classes of landmark owners. Penn Central

is relegated to that category which cannot obtain relief from the Landmarks Law. Moreover, as demonstrated by plaintiffs, there is neither a common thread nor a common sense segregation of classes of property. It is this feature which denies to plaintiffs the equal protection of the laws. The power of classification cannot be arbitrarily exercised. The distinctions made must have some reasonable basis (*Rosenthal v. New York*, 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed. 212 [1912]; Cf. *Brown v. Board of Trustees*, 303 N.Y. 484, 104 N.E.2d 866 [1952]).

The remaining contentions raised by defendants have been considered and found to be without merit. Accordingly, the order and judgment of the Supreme Court, New York County (Saypol, J.), entered respectively on January 21, 1975 and February 4, 1975 declaring that the Landmarks Law of New York City and the actions taken pursuant thereto by the Landmarks Preservation Commission as *heretofore* applied to Grand Central Terminal and its site (a) constitute a taking of private property for public use without compensation and (b) deny to plaintiffs due process of law and the equal protection of the laws, should be affirmed, with costs and disbursements.

MARKEWICH, J., *concur*s.

(2)

**Order (with Findings of Fact) of the New York Supreme Court,  
Appellate Division**

**(Filed April 7, 1976)**

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York, on the 7th day of April, 1976.

PRESENT:

Hon. Harold A. Stevens, *Presiding Justice*.

Hon. Arthur Markewich, Hon. Theodore R. Kupferman, Hon. Francis T. Murphy, Jr., Hon. Vincent R. Lupiano, *Justices.*

(CAPTION OMITTED IN PRINTING)

The defendants-appellants the City of New York and the Landmarks Preservation Commission of the City of New York having appealed from an order of the Supreme Court, New York County (Saypol, J.), entered on or about January 21, 1975, severing plaintiffs' causes of action for compensation from their causes of action for declaratory and equitable relief, and from a judgment of said Court entered on or about February 4, 1975, adjudging that certain actions of the defendants constitute a taking of private property without just compensation and enjoining defendants from taking said action; and said appeal having duly come on to be heard before this Court, and having been argued by Ms. Nina G. Goldstein, of counsel for the defendant-appellants, and by Mr. John E. F. Wood, of counsel for the plaintiffs-respondents; and due deliberation having been had thereon; and upon the opinion of this Court by Mr. Justice Murphy filed herein and made a part hereof; with two of the Justices dissenting upon an opinion by Mr. Justice Lupiano, and upon the findings of fact made by this Court herein; it is hereby

ORDERED and ADJUDGED that the order and judgment of Supreme Court, New York County (Saypol, J.) entered, respectively, on January 21, 1975 and February 4, 1975, here appealed from, be and the same hereby are reversed, on the law and the facts, with costs; and it is further

ORDERED and ADJUDGED that all declarations of law by the Supreme Court, New York County, accompanying the judgment appealed from be and the same hereby are reversed, on the law and the facts; and it is further

ORDERED and ADJUDGED that all the findings of fact made by the Supreme Court, New York County, accompanying

the judgment appealed from, inconsistent with the new findings of fact set forth in the opinion of this Court, be and the same hereby are reversed, and this Court in lieu thereof makes the following new findings of fact:

1. In recent years, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

2. Urban landmarks are now acknowledged to merit recognition as "an imperiled species." If destruction of such landmarks continues at its present pace, by 1976 the nation will have lost an essential part of its architectural and cultural heritage.

3. The preservation of landmarks in urban areas is of special importance. Grand Central Terminal is an important and irreplaceable component of the special uniqueness of New York City. It is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents.

4. From its formal opening to the public in 1913 (as a replacement for the "Grand Central Depot" built by Cornelius Vanderbilt in 1871) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design.

5. The need to preserve structures worthy of landmark status is beyond dispute; and the propriety of the landmark designation accorded Grand Central Terminal is essentially unchallenged.

6. Plaintiff Penn Central is the successor to the New York Central Railroad Company and the Pennsylvania Railroad. For purposes herein, "Penn Central" includes its subsidiaries plaintiffs The New York and Harlem Railroad Company and The 51st Street Realty Corporation. Plaintiff UGP Properties, Inc. ("UGP") was incorporated after the

landmark designation here in issue; it is a wholly owned subsidiary of a British Company.

7. Penn Central's losses over the last several years brought it to insolvency and bankruptcy. In order to minimize such losses and provide offsetting revenues, it entered into a lease with UGP in January, 1968, pursuant to which UGP was to erect a tower exceeding 50 stories over the Terminal. UGP undertook to pay to Penn Central \$1,000,000 per year during construction and thereafter an amount that was guaranteed to equal not less than \$3,000,000 annually. In addition, UGP assumed a portion of Penn Central's real estate taxes estimated at \$578,500. These rental payments were to be offset in part by the elimination of approximately \$700,000 to \$1,000,000 in net rents presently received from concessionaires whose space would be occupied by the proposed new building.

8. Commencing in July, 1968, plaintiffs submitted to the Landmarks Commission several building designs prepared by the architectural firm of Marcel Breuer & Associates (called Breuer I, Breuer II and Breuer II Revised) and requested an appropriate certificate (of no exterior effect or of appropriateness). Plaintiffs have indicated a preference for Breuer II Revised, which would have preserved the Terminal's Main Concourse, but not its famous south facade. On August 26, 1969, a certificate of appropriateness was denied.

9. Grand Central Terminal receives partial real estate tax exemption pursuant to Real Property Tax Law, § 489 ff.

10. The landmark parcel at issue is not devoted to a charitable purpose; and no claim is made that it cannot be used for its prime function—as a railroad terminal.

11. Plaintiffs failed to meet their burden of establishing that they are *incapable* of obtaining a reasonable return from Grand Central Terminal operations.

12. To support the claim that it is actually sustaining a loss from Terminal operations, Penn Central submitted a "Statement of Revenues and Costs" for the years 1969 and 1971. These statements, which were prepared for the instant litigation, improperly attribute a considerable amount of railroad operating expenses (and some taxes) to their real estate operations. For example, the expense items included "Station Master and Staff", "Information Clerks" and "Gate Usher". Such huge cost items (for 1971) as "maintenance, repairs and service plant operation" (\$1,141,679), "cleaning" (\$632,753), "policing" (\$438,566), "materials and supplies" (\$69,692), and "utilities" (\$660,710) were related to the entire terminal operation and not segregated as between the railroad and real estate portions thereof.

13. No rental value whatsoever was imputed to the vast space in the terminal devoted to railroad purposes. Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal (including trackage, platforms, concourse, waiting rooms, ramps, ticket windows and public amenities) for such service. The reasonable rental value of such space was improperly omitted.

14. Plaintiffs have failed to show that they are unable to increase the Terminal's commercial income by transforming vacant or under utilized space to revenue producing use.

15. Plaintiffs have failed to show that unused development rights over the terminal could not have been profitably transferred to one or more nearby sites.

16. Plaintiffs have failed to show that Penn Central's agreements with the Metropolitan Transportation Authority and the Connecticut Transportation Authority provide a basis for invalidating the Terminal's landmark designation.

17. On the instant record, plaintiffs have failed to meet their burden of proving that the City's Landmarks Law is unconstitutional as applied to them.

18. On the instant record, plaintiffs have failed to meet their burden of demonstrating that the regulation in issue deprives them of all reasonable beneficial use of their property.

And it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them; and it is further

ORDERED that the Clerk of the County of New York is directed to enter judgment in favor of the defendants-appellants as herein provided, with \$60 costs and disbursements of this appeal.

ENTER:

F. T. M.

*Justice*

# APPENDIX C

(1)

## Findings of Fact and Declarations of Law of the New York Supreme Court, Trial Term

At a Trial Term, Part XII, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, on the 29 day of May, 1974.

Present: HON. IRVING H. SAYPOL, *Justice*.

PENN CENTRAL TRANSPORTATION COMPANY et al., *Plaintiffs-  
Respondents*,

v.

The CITY OF NEW YORK and the Landmarks Preservation  
Commission of the City of New York, *Defendants-  
Appellants*.

## FINDINGS OF FACT

The Court hereby finds as follows:

### GENERAL

1. Plaintiff Penn Central Transportation Company ("Penn Central") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a general office at 466 Lexington Avenue, New York, New York. It is the successor to The New York Central Railroad Company and the Pennsylvania Railroad Company, which were merged as of February 1, 1968.

2. Penn Central was declared bankrupt on June 21, 1970 and has remained bankrupt since that time.

3. Plaintiff The New York and Harlem Railroad Company ("The New York and Harlem") is, and has been at

all times relevant to this action, a corporation organized and existing under the laws of the State of New York with approximately 95% of its stock owned by the Trustees of Penn Central and with a general office at 466 Lexington Avenue, New York, New York.

4. Plaintiff The 51st Street Realty Corporation is, and has been at all times relevant to this action, an indirectly wholly owned subsidiary corporation of Penn Central, organized and existing under the laws of the State of New York with a general office at 466 Lexington Avenue, New York, New York.

5. Plaintiff UGP Properties, Inc. ("UGP") is, and has been at all times since its formation on December 5, 1967, a corporation organized and existing under the laws of the State of New York.

6. Defendant The City of New York (the "City") is a municipal corporation of the State of New York.

7. Defendant The Landmarks Preservation Commission of the City of New York (the "Landmarks Commission") was established as a commission of the City pursuant to Local Law 46 of the City for the year 1965, which amended the Charter and the Administrative Code of the City so as to add to each of them a new Chapter 8-A.

8. Grand Central Terminal (the "Terminal") was constructed in the early 1900's and opened to the public in 1913. It is located in the Borough of Manhattan. The building faces on Forty-Second Street to its south and is bounded on the west by Vanderbilt Avenue at street level. On the east, it adjoins the Commodore Hotel at street level. Above street level it is bounded on its south, east and west by the Park Avenue overhead roadway. To its north, the Terminal is bounded by the Pan Am Building. It is and always has been used in the interstate and intrastate carriage of railroad passengers.

9. The Terminal is deteriorating at a substantial rate. The condition of the Terminal was such that repairs and maintenance work costing approximately \$1,278,135 were necessary in June, 1972.

10. The Terminal was originally intended to be a combination railroad terminal and office building. The original plan for the Terminal provided for a 20-story office tower to be constructed on top of the present Terminal and columns were built into the Terminal, which are still in place today, whose purpose is to support such a tower.

11. The land on which the Terminal stands (the "Terminal site") is designated in the Tax Map of the City as Block 1280, Lot 1, Borough of Manhattan.

12. The Terminal and the Terminal site have received partial tax exemption amounting to \$11,083,489 since the early 1960's under Section 489ff of the Real Property Tax Law of the State of New York.

13. On August 2, 1967, over Penn Central's objection, the Terminal was designated a Landmark and the Terminal site a Landmark site by the Landmarks Commission.

#### OWNERSHIP AND LEASEHOLD INTERESTS IN THE TERMINAL PROPERTY

14. The ownership and leasehold interests in the Terminal and the Terminal site, held by the respective plaintiffs, are; and have been at all times relevant to this action, unless otherwise noted, as follows:

(a) The New York and Harlem Railroad Company owns the fee;

(b) Penn Central has a lease, expiring in the year 2274 A.D. from The New York and Harlem Railroad Company;

(c) UGP entered into a lease, dated as of January 22, 1968, with The 51st Street Realty Corporation (the

"Lease") which, at that time, had a grant of term of the Terminal and the Terminal site from Penn Central. The 51st Street Realty Corporation assigned all of its interest in the Lease, the Terminal and the Terminal site to Penn Central and The New York and Harlem on July 21, 1969.

15. The Lease was the result of arms-length negotiations and is for a term of 50 years after its commencement date with UGP having an option to renew for an additional 25 years thereafter. Under the Lease, UGP is to construct and operate a multi-story office building on the southerly portion of the Terminal site.

#### BREUER I, II AND II REVISED

16. UGP retained the architectural firm of Marcel Breuer & Associates in February, 1968, to design an office building for the Terminal site.

17. By June, 1968, Marcel Breuer & Associates completed the first schematic plans, Breuer I for an office building with 55 office floors which would rise above the Terminal and would preserve the exterior of the Terminal.

18. On July 18, 1968, plaintiffs submitted proposed building plans for Breuer I to the Landmarks Commission and applied for a Certificate of No Exterior Effect permitting its construction. These plans were also filed with the Department of Buildings of The City of New York to obtain zoning approval. The application was denied by the Landmarks Commission on September 20, 1968.

19. Marcel Breuer & Associates following negotiations and discussions between the parties thereafter designed Breuer II, a building with 53 office floors which would have necessitated replacing part of the exterior of the Terminal.

20. On January 20, 1969, plaintiffs applied to the Landmarks Commission for a Certificate of Appropriateness,

under Section 207-6.0 of the Landmarks Law, permitting construction of either Breuer I or Breuer II.

21. Because of the plaintiffs' concern that the possible adverse effect of Breuer II on the City's easement rights in the elevated roadway surrounding the perimeter of the Terminal might be used as a basis for the refusal of a permit to build Breuer II, Marcel Breuer & Associates designed Breuer II Revised which plaintiffs submitted in place of Breuer II. Breuer II Revised was substantially similar to Breuer II, except that it would not encroach upon the elevated roadway. During the course of the proceedings, plaintiffs expressed a preference for Breuer II as revised over Breuer I.

22. Plaintiffs' application for a Certificate of Appropriateness was denied as to both Breuer I and II Revised on August 26, 1969.

23. Breuer II would be 254 feet southerly from the adjoining Pan Am Building; Breuer I and II Revised would be approximately 225 feet southerly from the Pan Am Building.

24. If Marcel Breuer & Associates had begun work on the plans for Breuer II and II Revised at the time that schematic plans for Breuer I were prepared, schematic plans for Breuer II and II Revised could have been completed by June, 1968.

#### HARM TO PLAINTIFFS

25. The Terminal site is a valuable location for an office building. It is in the heart of a commercial area occupied mainly by high-rise commercial structures such as office buildings and hotels. Any of the plaintiffs' proposed structures over the Terminal site would be directly above a transportation hub of commuter, railroad and subway lines, with ready access internally by occupants of the building to such facilities.

26. In 1968 there was a favorable office rental market in favor of landlords in the Grand Central area. Rental activity for space in an office building on the Terminal site would have started on the basis of architects' plans beginning in June, 1968. Construction of the building would have been completed within three to three and one-half years thereafter.

27. Plaintiffs were prepared to undertake renting and commencement of construction of an office building on the Terminal site in 1968, but were precluded from proceeding because of the defendants' refusal to permit this.

28. Diesel Construction Company, builder of the Pan Am Building, was retained in early 1968 by UGP to construct a building on the Terminal site.

29. Collins, Tuttle & Company, engaged in the sale, rental and management of real estate, was retained by UGP in December, 1967, to rent, obtain financing and as consultant for a building on the Terminal site. Collins, Tuttle & Company began a renting and financing program in early 1968. At that time Collins, Tuttle & Company solicited prospective tenants primarily to lease the space in Breuer I, principally on a single floor occupancy basis, for terms of 20 to 30 years, but these activities were halted due to defendants' denial of a Certificate of No Exterior Effect. Investors financing the building at a favorable interest rate were likewise solicited, but their participation was deferred for the same reason.

30. The total cost of Breuer I would have been \$108,554,741, including construction costs of \$82,344,400; Breuer II would have cost \$106,541,730, of which \$77,306,500 would have been construction costs; and Breuer II Revised would have cost \$108,486,444, of which \$79,365,000 would have been construction costs.

31. If construction of Breuer I had commenced in 1968, the City would have received substantially increased property taxes upon commencement of construction.

32. Under the Lease, Penn Central is to receive \$1,000,000 per year during the construction of a building by UGP on the Terminal site. Upon completion, Penn Central is to receive an annual rent of \$1.10 per square foot of net rentable space, exclusive of ground floor space, plus \$400,000, plus 5% of the gross income, with a guaranteed minimum of \$3,000,000 per year. Upon completion of construction Penn Central would have received an annual rent of up to \$3,738,977 from Breuer I.

33. As additional compensation to Penn Central, UGP is to pay under the Lease all taxes on the Terminal site considered as unimproved from the time UGP is permitted to construct a building. From June, 1968, through July, 1972, these taxes totaled \$1,372,530. UGP is also to pay all taxes on the Terminal (the building) within the area demised to it, thereby reducing the amount of taxes that Penn Central would have to pay on the Terminal.

34. UGP expected to receive a yearly cash flow of at least \$2,839,131 from Breuer I upon its completion, \$3,325,620 from Breuer II and \$3,181,702 from Breuer II Revised. By the end of the first five years, UGP's anticipated aggregate profit would have been \$20,495,655 from Breuer I, \$22,928,100 from Breuer II and \$22,208,510 from Breuer II Revised.

35. Due to defendants' actions preventing plaintiffs from constructing a building on the Terminal site, Penn Central and The New York and Harlem Railroad Company have been deprived of the rent they would have received from UGP and the taxes UGP would have assumed; and UGP has been deprived of the profit it would have made from such a building.

36. For the years 1967 to 1971, the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal.

37. The net deficit to Penn Central from operating the Terminal was \$1,165,470 in 1969 and \$1,902,467 in 1971.

38. As of June 1, 1972, the Metropolitan Transportation Authority leased the Terminal and, together with the Connecticut Transportation Authority, receives all revenues from tenants and concessionaires in it (with the exception of any rent Penn Central would receive under its lease with UGP) and has assumed all costs of operating the Terminal. Penn Central is obligated to pay these agencies \$4,500,000 a year for the next five years and \$2,000,000 thereafter. The Metropolitan Transportation Authority received partial reimbursement for these costs from the City.

TRANSFER OF DEVELOPMENT RIGHTS (AIR RIGHTS)  
ZONING RESOLUTIONS 74-79 THROUGH 74-793

39. Zoning Resolutions 74-79 through 74-793 (the "Transfer Resolutions") contemplated compensatory relief for owners of landmarks, including long-term lessees such as UGP, for the taking caused by the designation of such properties as landmarks.

40. As originally enacted in May, 1968, the Transfer Resolutions neither provided compensation to plaintiffs nor minimized the harm suffered by plaintiffs due to the designation of the Terminal as a landmark.

41. The pertinent Transfer Resolutions as last amended in December 1969, although affording increased transfer rights from the Terminal site to other properties owned by Penn Central, do not provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark.

42. The property principally suggested for the transfer of development rights is the present site of the Biltmore Hotel. Development rights could not be economically transferred to the Biltmore site because:

(1) The Biltmore Hotel is and has been a profitable operation.

(2) A building on the Biltmore site could not have been profitable because (a) the ground rent required of UGP by Penn Central for a lease of the Biltmore site was \$2,000,000 a year more than in the Terminal lease, and (b) there would have been increased costs of construction, financing, taxes and building operation.

(3) Rents from an office building on the Biltmore site would be significantly lower than from one on the Terminal site which is a superior location.

DECLARATIONS OF LAW

It is hereby concluded and declared that:

1. The Landmarks Law as applied to plaintiffs, and the actions of defendants, constitute a taking of plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of New York, Article I, Section 7.

2. The Landmarks Law as applied to plaintiffs, and the actions of defendants, deprive plaintiffs of the equal protection of the laws, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 11.

3. The Landmarks Law as applied to plaintiffs, and the actions of defendants, deprive plaintiffs of their property without due process of law, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 6.

4. There is no provision of the Landmarks Law which affords relief to the plaintiffs, with respect to the Terminal or the Terminal site, against the economic hardship which

they have suffered as a result of the defendants' actions under the Landmarks Law. Although Section 207-8.0 of the Landmarks Law affords such relief to landmark owners generally (including ultimately the lifting of landmark restrictions) upon a showing of economic hardship, the provisions of Section 207-8.0a(2) deny such relief to the plaintiffs, whether by way of certificate of appropriateness, notice to proceed or otherwise, because the Terminal and the Terminal site are partially exempted from taxation under Section 489ff of the Real Property Tax Law.

ENTER:

IRVING H. SAYPOL  
Irving H. Saypol, J.S.C.

(2)

**Order of Severance of the New York Supreme Court,  
Trial Term**

At a Trial Term, Part XII, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, on the 12 day of January, 1975.

Present: HON. IRVING H. SAYPOL, *Justice*.

(CAPTION OMITTED IN PRINTING)

Pursuant to CPLR Rule 5012, it is ordered that plaintiffs' causes of action for compensation for the taking of their property are severed from their causes of action for declaratory and equitable relief, that jurisdiction of the causes of action for compensation is reserved in this Court, and that decision with respect to the right to compensation and the amount of compensation, if any, is deferred pending completion of appellate review of the final judgment to be entered herein upon the causes of action for declaratory and

equitable relief or expiration of the time for such review without an appeal having been taken, or until further order of this Court.

Enter:

IRVING H. SAYPOL  
Irving H. Saypol, J.S.C.

Filed

Jan 21 1975

New York  
County Clerk's Office

(3)

**Memorandum Decision of the New York Supreme Court,  
Trial Term**

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART XII

(CAPTION OMITTED IN PRINTING)

SAYPOL, J.:

This is an action for declaratory judgment. In addition to the admitted allegations of the complaint and the facts found as indicated in the accompanying marked findings, presentation here is greatly facilitated in the following excerpted recitals from the supplemental report of former Associate Judge John Van Voorhis of our Court of Appeals serving as special master in related debtor reorganization proceedings in the United States District Court, District of Connecticut.

Plaintiff Penn Central Transportation Company (Penn Central) controls co-plaintiff New York and Harlem Railroad which owns the fee of Grand Central Terminal located on 42nd Street in the heart of Manhattan in one of the most valuable commercial areas in the world, surrounded by multi-story office buildings and similar structures. Penn Central has a 300-year lease from New York and Harlem Railroad. Penn Central's wholly owned subsidiary, co-plaintiff 51st Street Realty Corporation, has a grant from Penn Central for a term co-terminous with a lease from 51st Street Realty Corporation to co-plaintiff UGP Properties Inc., the latter under its lease undertaking to erect and operate a multi-story office building over the Terminal. When the Terminal was erected the plan and construction of its foundation contemplated the future super-imposition of twenty stories over the Terminal. In this background, the following is from Judge Van Voorhis' report:

"IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad  
No. 30226

In the Matter of  
THE NEW YORK, NEW HAVEN AND HARTFORD  
RAILROAD COMPANY,  
Debtor

SUPPLEMENTAL REPORT OF SPECIAL MASTER RESPECTING  
DEBTOR'S RIGHT, TITLE OR INTEREST IN THE GRAND  
CENTRAL TERMINAL PROPERTIES

This report, as authorized June 25, 1968 at New Haven, by the United States District Court for the District of Connecticut, Honorable Robert P. Anderson, United States Circuit Judge, sitting by designation, supplements the report previously submitted by me as Special Master under date of June 17, 1968.

. . .

The most important development since April 19, 1965, . . . has been the lease agreement between a Penn-Central subsidiary and a corporation known as UGP Properties, Inc. of the air rights above the Grand Central Terminal building for the construction of a proposed fifty-five story office building planned (according to a press release mentioned by Penn-Central's counsel) to have 1.9 million square feet of office space. The lease agreement is in evidence, marked BH 1, A, B, C, and provides for the payment of 1 million dollars annual rent for four years and thereafter at a \$1.10 per square foot of net rentable space, exclusive of ground floor space, which may from time to time exist in the new building plus \$400,000 per annum all payable monthly in [6075] advance. The term of the lease is 50 years. The tenant agrees to pay the taxes and an additional percentage rent of 5 per cent of gross income which, plus the flat rent, is guaranteed to be not less than 3 million dollars per year commencing not later than four years after the commencement date of the lease. It was conceded that the plans for this proposed building, designed to float over the Terminal building, comply with the existing regulations of the City Planning Commission and the zoning regulations. This lease was, to be sure, delivered to the tenant subject to a letter providing that if the tenant has used its best efforts 'to obtain a certificate of appropriateness or notice to proceed from the Land-

marks Preservation Commission\* and has failed after appropriate order of the Supreme Court of the State of New York and provided, further, that there exists an outstanding designation by the Landmarks Preservation Commission of Grand Central Terminal as a landmark, Tenant and said Sublandlord shall have the right to rescind Lease and Sublease, respectively, by giving to Landlord ten days' written notice of such intention', and in exerting its 'best efforts' the tenant is required to file an application with the Landmarks Preservation Commission prior to August 1, 1968 and to bring an action or proceeding through counsel approved by the landlord against any adverse ruling by the Landmarks Preservation Commission. The landlord is given the right to rescind the lease if the tenant has not obtained this result by January 1, 1970 [extended by agreement of the parties until July 1, 1975] and upon any rescission [sic] of the lease the tenant is required to assign to the landlord its interest in any action or proceeding pending in the New York Courts relating to the application of the Landmarks Preservation Commission or relating to the designation of Grand Central Terminal as a landmark or pertaining to any rights or entities under the statute pursuant to which Grand Central Terminal is designated a landmark [landmark]. In event of adverse decision the landlord is authorized to appeal and the tenant is required to cooperate with the landlord in all matters pertaining to any such action or proceeding. When asked at the hearings whether Penn-Central had abandoned this project, the answer was unqualifiedly 'No'. Counsel for Penn-Central informed the Court on May 8, 1968, in the earlier hearings that an Article 78 proceeding

\* Pursuant to Chapter 8-A of the N.Y. City Administrative Code §§ 205-1.0 through 207-21.0.

[this plenary action for declaratory judgment instead] has been commenced by Central to contest the designation of Grand Central Station as a landmark, and that that this suit includes a test of the constitutionality of the Landmarks Preservation Act which is subdivision 25-a of the General City Law providing that cities are empowered:

'To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations, for their protection, enhancement, perpetuation [6086] or use, which may include appropriate and reasonable control of the use or appearance of the neighboring private property within public view, or both. In any such instance such measures if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation which may include the limitation or remission of taxes.' [Emphasis supplied] [1]

The New York City Landmarks Preservation Commission is constituted pursuant to sections 205-207 of the New York City Charter constituting Chapter 8-A added by local law No. 46, April 19, 1965. The constitutionality, in certain situations of the Landmarks Preservation Act was upheld at special term in *Manhattan Club v. Landmarks Preservation Commission*, 51 Misc 2d 566 and but [sic] not in *Trustees of Sailors Snug Harbor v. The Landmarks Preservation Commission* 53 Misc 2d 933.\* A landlord has been held to

[1] [former General City Law § 20, subd. 25-a, repealed L. 1968, c. 513, §2; similar provision is now General Municipal Law § 96-a, L. 1968, c. 513, § 3]

\* "The regulation imposes so disproportionate a burden upon the landowner that it must be set aside in this case as an unlaw-

be entitled to test the constitutionality as applied to his property by action for a declaratory judgment (Lutheran Church in America v. New York, 27 App. Div. 2d 237). The same statute was obliquely involved in Keystone Associates v. Moerdler, 19 N. Y. 2d 78, (although there it was a different statute which was held to be unconstitutional), wherein an injunction was denied to restrain the demolition of the old Metropolitan Opera House. The Court said: 'It is not necessary, at this time, to enter into a discussion of the Landmarks Preservation Law or any other statute which appears to have been enacted in the exercise of the police power.'

If this new project is accomplished, it appears likely to add at least \$2,300,000 to the annual income of the Terminal Account. The parties stipulated that the facts stated at pages 600-05 of the transcript of the hearing held before me on May 8, 1968 are correct, and it was indicated at page 601 that the rent for these air rights would be in part offset by the displacement of some stores and concessions in the Terminal building now bringing in approximately \$700,000 per year. This apparently refers to stores on 42nd Street and some concessions in the waiting room entrance and on the south wall of the main rotunda of the station.

There is, of course, a precedent for this structure in the Pan-American Building located about 200 feet to the north. Whether the opposition to its construction will succeed is not presently known, but it would seem to me, that the probabilities are in its favor. The

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ful taking of property without just compensation [citing cases]":  
Last paragraph of opinion.

Grand Central Station is not proposed to be removed. [6087-6088] It is doubtful that the City could insist upon its being maintained at Penn Central's expense as a memorial to the golden age of railroading. The building, as it is, is expensive to maintain, and even under the broad scope of the police power in modern times it is doubtful that it can be so constricted without there being a taking without payment of just compensation as required by the state and federal constitutions. This is particularly true in view of the similarity and close proximity to the Pan-Am Building which, it might be argued, could constitute discrimination denying the equal protection of the law. If, under a reorganization plan, all right, title and interest of New Haven in the GCT properties is to be transferred to Penn-Central, a large potential increase in the surplus revenue to be computed of the Terminal Account should result from these valuable air rights. The fairest way might be to insert a provision in the reorganization plan and purchase agreement which would require substantially more to be paid for New Haven's rights if a building is erected above the Grand Central Station.

. . .

Dated: July 22, 1968

Respectfully submitted,

JOHN VAN VOORHIS  
Special Master"

Lutheran Church *supra* cited in Judge Van Voorhis' report ultimately was resolved by a divided court, 42 A D 2d 547, the majority rejecting the landmarks designation as an abuse of administrative discretion, the minority disagreeing saying that the majority decision constituted the substitution of judicial for administrative discretion. When Trus-

tees of Sailors' Snug Harbor *supra*, Judge Van Voorhis, reached the Appellate Division, 29 A D 2d 376 (relied on here by both sides) it was held that the state had the power to restrict use for the cultural and aesthetic benefit of the community where the conditions exist favoring such a restriction and where Constitutional rights are not infringed. But, continued Associate Justice Aaron Steuer for the unanimous court:

"Conceding the validity of regulation, the question presented is whether in the particular instance regulation goes so far that it amounts to a taking (Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415). If it does, it is constitutionally prohibited (Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 498). Chapter 8-A [Administrative Code of the City of New York] provides some guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances (§ 207-8.0, subd. a). \* \* \* *The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return.*" (Emphasis supplied)

The New York City Landmarks Law distinguishes between a landmark and a landmark site which is defined as:

"\* \* \* An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." [2 New York City Administrative Code Ch. 8A, § 207-1.0(1)]

It then provides that:

"\* \* \* [I]t shall be unlawful for any person in charge of a landmark site \* \* \* to alter, reconstruct or demolish any improvement constituting a part of such

site \* \* \* or to construct any improvement upon land embraced within such site \* \* \* or to cause or permit any such work to be performed upon such improvement or land, unless the commission has previously issued a certificate of no exterior effect, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued." [§ 207-4.0(a)(1)].

It also mandates:

"\* \* \* a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

"b. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair." [§ 207-10.0]

\* \* \*

"\* \* \* [I]t shall be unlawful for any person in charge of any improvement located on a landmark site or in an historic district to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work." [§ 207-9.0]

Violations of § 207-4.0, § 207-9.0 or § 207-10.0 are subject to criminal penalties as provided in § 207-16.0.

Summarizing, the owner of a landmark site is prohibited from making any changes not only to a landmark on the site, but also to any other improvement on the landmark site without express Landmarks Commission approval. The landmark may not be replaced with a structure permitted under the zoning law of the City; it is prohibited to add another structure on the site which would not even touch the landmark, or from making a slight change in the exterior of any improvement on the site; one may not construct fences or barriers around his property to exclude intruders; he may not even replace multipane windows on non-landmark buildings on a landmark site with picture windows. The list is virtually endless. In short one is limited to maintaining all of the property in its original condition as of the time of designation as a landmark site at one's own expense. Such a severe restriction on the use and enjoyment of property, it is argued by the plaintiffs, constitutes a taking of property as a matter of law.

The clerk is now directed to file the annexed findings of fact, judgment and order of severance.

The findings of fact and conclusions of law and the judgment were completed and signed on May 29, 1974, after review with counsel in extensive hearings. Filing was withheld, however at the request of the parties. Meanwhile the Court of Appeals decided *Lutheran Church v. City of N.Y.* on July 25, 1974 (35 N Y 2d 121). Gabrielli, J., for the majority of the Court, held that landmarks designation generally constitutes a taking for which compensation is mandated. What was said for the majority and for the dissenters in *Lutheran*, supra, as to the lack of findings of fact is not present here. The findings here adequately cover such elements as economic hardship, lack of compensatory alternative to alleviate economic hardship, inadequacy of relief by tax rebate, etc., etc. This establishes unconstitutionality of the statute as applied.

Aesthetics is not for decision here. However, beauty or art deserving preservation where those competent in the field might disagree would not be for a court's conclusion. Visualized in the mind's eye, looking up South Park Avenue towards Grand Central Station, set as it is in a canyon surmounted by sky scrapers with the Pan American Building immediately behind it, it looks like part of that Pan American Building. More closely viewed, surrounded as Grand Central is by the heavily travelled roadway around its perimeter on three sides, it leaves no reaction here other than that of long neglected faded beauty. The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers.

Declaration is for the plaintiffs invalidating the designation on Constitutional grounds. On the agreement of the parties the defendants' order of severance is signed, reserving the question of damages.

Dated: January 21, 1975.

JHS  
J. S. C.

(4)

**Judgment of the New York Supreme Court,  
Trial Term**

At a Trial Term, Part XII of the Supreme Court of the Stat of New York, held in and for the County of New York at the Courthouse thereof, on the 29 day of May, 1974.

Present: HON. IRVING H. SAYPOL, *Justice*.

(CAPTION OMITTED IN PRINTING)

The issues in the above-entitled action having duly come on for trial before the Hon. Irving H. Saypol without a jury

at a Trial Term, Part XII, of this Court, held at the Court-house thereof, and the allegations and evidence of the parties having been heard, and a severance having been ordered pursuant to CPLR Rule 5012 severing plaintiffs' causes of action for compensation from their causes of action for declaratory and equitable relief, and the Court having made and signed its findings of fact and declarations of law,

Now, it is Ordered, Adjudged, Decreed, and Declared, that:

1. Chapter 8-A of the Charter and Administrative Code of the City of New York (the "Landmarks Law") as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the property designated in the Tax Map of the City of New York as Section 5, Block 1280, Lot 1, Borough of Manhattan, or any improvements thereon (the "Property"), constitute a taking of plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of New York, Article I, Section 7.

2. The Landmarks Law as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the Property, deprive plaintiffs of the equal protection of the laws, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 11.

3. The Landmarks Law as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the Property, deprive plaintiffs of their property without due process of law, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 6.

4. Defendants are permanently enjoined from using or threatening to use the Landmarks Law or any provision thereof, or from taking any action thereunder, to prevent,

impede or obstruct, directly or indirectly, the construction, use or occupancy, of an otherwise lawful improvement on the Property.

5. The plaintiffs shall recover of the defendants the costs and disbursements of this action to be taxed by the clerk of the Court.

Enter:

IRVING H. SAYPOL  
Irving H. Saypol, J.S.C.

Filed

Feb 4—1975

New York  
County Clerk's Office

**APPENDIX D**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY  
CORPORATION and UGP PROPERTIES, INC., *Appellants,*

—against—

THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION  
COMMISSION OF THE CITY OF NEW YORK, *Appellees.*

**Notice of Appeal to the  
Supreme Court of the United States**

NOTICE IS HEREBY GIVEN that the appellants above named hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals, State of New York, entered in this action on June 23, 1977 affirming an order of the Appellate Division of the State of New York, First Department, which reversed on the merits an order of the Supreme Court, New York County, and granted judgment in favor of appellees dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).  
Dated: August 31, 1977.

/s/ Carl Helmetag  
CARL HELMETAG, Esq.  
Suite 3100 IVB Building  
1700 Market Street  
Philadelphia, Pa. 19103

/s/ Covington & Burling  
COVINGTON & BURLING  
888 Sixteenth St. N.W.  
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& BOARDMAN  
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New York, N.Y. 10005

*Attorneys for Appellants*

TO: CLERK OF THE SUPREME COURT  
NEW YORK COUNTY

W. BERNARD RICHLAND, Esq.  
*Corporation Counsel*  
Municipal Building  
New York, N.Y. 10007

*Attorney for Appellees*

**APPENDIX E****(1)****CHAPTER 8-A****PRESERVATION OF LANDMARKS AND  
HISTORICAL DISTRICTS**

§ 205-1.0 **Purpose and declaration of public policy.**—a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world-wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic,

aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 207-1.0 **Definitions.**—As used in this chapter, the following terms shall mean and include:

- a. "Alteration". Any of the acts defined as an alteration by the building code of the city.
- b. "Appropriate protective interest". Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.
- c. "Capable of earning a reasonable return". Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.
- d. "City-aided project". Any physical betterment of real property, which:

- (1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or other mode of financial assistance, exercise of the city's powers of eminent domain, contribution of city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission". The landmarks preservation commission.

f. "Day". Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 207-16.0 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes; provided however, that the term "improvement parcel" said\* also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as an interior landmark pursuant to the provisions of this chapter.

\* So in original. Should probably be "shall".

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 207-18.0 of this chapter the surfacing, resurfacing, painting, renovating, restoring, or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement; for which a permit issued by the department of buildings

is not required by law, where the purpose and effect of of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 207-8.0 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the City, which is in effect at the time of the filing of the request for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed

valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as the result of a transaction at arms' length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a co-operative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission,

may have a bearing upon the question of financing; and

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 207-8.0 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

**§ 207-2.0 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.**

—a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate, and as herein provided in subdivision j in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of scenic landmarks, located on property owned by the city, which are identified by a description setting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of such subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 207-17.0. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision d.

e. Subject to the provisions of subdivisions g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the health services administration.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved.

(2) Such board may modify or disapprove such designation or amendment thereof within ninety days after a copy

thereof is filed with the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to such board a report with respect to the relation of such proposed rescission to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the resolution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to paragraph a shall be made pursuant to notices of public hearings given, as provided in § 207-12.0.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic district or any amendment of any such designation or rescission thereof the commission shall cause to be recorded in the office of the register of the city of New York in the county in which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the borough and county of Richmond in the office of the clerk of said county of Richmond, a notice of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers and its tax map, block and lot number or numbers and in the case of all other counties, by its land map block and lot number or numbers.

§ 207-3.0 **Scope of commission's powers.**—a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the

construction, reconstruction, alteration, demolition or use of such improvement, or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 207-4.0 **Regulation of construction, reconstruction, alterations and demolition.**—a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district of any part of an improvement containing an interior landmark, to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision a of section 207-17.0 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 207-11.0 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 207-17.0 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The appli-

cant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application, or amended application every such applicant shall file with the commission, a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

**§ 207-5.0 Determination of request for certificate of no effect on protected architectural features.—a.** (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files, a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done, and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certifi-

cate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

**§ 207-6.0 Factors governing issuance of certificate of appropriateness.—a.** In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 207-5.0 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 207-8.0 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work

in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 207-3.0 of this chapter and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 207-3.0 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or construction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the com-

mission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features, together with such effects, and the exterior architectural features of the landmark and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

**§ 207-7.0 Procedure for determination of request for certificate of appropriateness.**—The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 207-8.0 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

**§ 207-8.0 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return.**—a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom; the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 207-6.0 of this chapter, shall, within ninety days after the filing of the request

for such certificate of appropriateness, makes a preliminary determination of insufficient return.

(2) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or sections 458, 460 or 479 of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to Sections 420, 422, 424, 425, 426, 427, 428, 430, 432, 434, 436, 438, 440, 442, 444, 450, 452, 462, 464, 468, 470, 472 or 474 of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) the owner of such improvement has entered into a bonafide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) the improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted

when acquired unless such owner is no longer engaged in pursuing such purposes; and

(d) the prospective purchasers or tenant:

(1) in the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its

preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing fiscal year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this

subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejection filed with the commission. If such an acceptance is filed, the commission shall deny the request of such appli-

cant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The Commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c, and d of this section within the period of time prescribed by such subdivision d; or

(b) the commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) a plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a

specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall

endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a purchaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one-hundred-eighty-day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one-hundred-eighty-day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant

obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ 207-9.0 **Regulation of minor work.**—a. (1) Except as otherwise provided in section 207-11.0 of this chapter, it shall

be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work.

(2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an his-

toric district or interior architectural feature of an improvement containing an interior landmark; or

(b) If such work would have such effect, whether judged by the standards set forth in subdivision b, c, d and e of section 207-6.0 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision e in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 207-5.0 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 207-17.0 of this chapter and to any city-aided project.

§ 207-10.0 **Maintenance and repair of improvements.**—a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof, which if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 207-11.0 **Remedying of dangerous conditions.**—a. In any case where the department of buildings, the fire department or the health service administration, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

§ 207-12.0 **Public hearings; conferences.**—a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part

of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof on the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or their last known address or addresses, as the same appear in the records of the office of the city director of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notice shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence, provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 207-5.0 and 207-9.0 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the im-

provement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the city director of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 207-13.0 **Extension of time for action by commission.**—Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work, the applicant may extend such period of time by his written consent filed with the commission.

§ 207-14.0 **Determinations of the commission; notice thereof.**—a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination and of any preliminary determination of insufficient return made pursuant to paragraph (1) of subdivision a of section 207-8.0 of this chapter to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 207-3.0 of this chapter, any determination of the commission granting a certi-

ificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivision g of section 207-8.0 of this chapter.

§ 207-15.0 **Transmission of certificates and applications to proper city agency.**—In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolution, the commission shall transmit such certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ 207-16.0 **Penalties for violations; enforcement.**—a. Any person who violates any provision of subdivision a of section 207-4.0 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 207-9.0 of this chapter or any provision of section 207-10.0 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than

thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, wilfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 207-4.0 of this chapter or paragraph two of subdivision a of section 207-9.0 of this chapter or any violation of the provisions of section 207-10.0 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

**§ 207-17.0 Reports by commission on plans for proposed projects.**—a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark; shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a city-aided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the commission a report on such plans proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within 45 days after such referral.

c. Except as provided in subdivision d of section 207-2.0, where the commission so requests, plans for the construc-

tion, reconstruction \* alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to conform with applicable laws concerning regulation of lots, storm water disposal and water courses. The administrator of the parks, recreation and cultural affairs administration may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

**§ 207-18.0 Regulations.**—The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of § 207-3.0 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions of an historic district and may vary from area to area in their provisions.

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 207-8.0 of this chapter; and

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter,

\* So in original.

including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 207-19.0 **Investigations and reports.**—The commission may make such investigations and studies of matters relating to the protections, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks and scenic landmarks as the commission may from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 207-20.0 **Applicability.**—a. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where, a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation or amended or modified designation pursuant to the provisions of section 207-2.0 of this chapter, first making the provisions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.

§ 207-21.0 **Separability.**—If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of this chapter and the applica-

tion of such provisions to other persons or circumstances shall not be affected thereby.

(2)

**New York City Zoning Resolutions 74-79 Through 74-793 \***

74-79

**Transfer of Development Rights from Landmark Sites.**

In all districts except R1, R2, R3, R4, or R5 Districts or C1 or C2 Districts mapped within such districts, for new *developments* or *enlargements*, the City Planning Commission may permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings, may permit the maximum permitted *floor area* on such adjacent lot to be increased on the basis of such transfer of development rights and may permit, in the case of residential *developments* or *enlargements*, the minimum required *open space* or the minimum *lot area per room* to be reduced on the basis of such transfer of development rights, and may permit [minor] variations in the front height and setback regulations for the purpose of providing a harmonious architectural relationship between the *development* or enlargement and the landmark building.

For the purposes of this Section, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied by the landmark building or one which is across a *street* and opposite to the lot occupied by the landmark building, or, in the case of a *corner lot*, one which fronts on the same *street* intersection as the lot occupied by the landmark building; it shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts a lot contiguous or one which is across a *street* and *opposite* to another lot or lots which

\* Matter in regular Roman type was in the resolutions as adopted on May 22, 1968. Matter in bold-face Roman type was added on December 4, 1969; matter in brackets, adopted on May 22, 1968, was deleted on December 4, 1969. Matter in italics is defined in Section 12-10 of the Zoning Resolutions and is not reproduced here.

except for the intervention of *streets or street* intersections from a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning lot* in Section 12-10).

A "landmark building" shall include any structure designated as a landmark by the Landmarks Preservation Commission and the Board of Estimate pursuant to Chapter 8-A of the New York City Charter and the Chapter 8-A of the New York City Administrative Code, but shall not include *public parks*, any structures within *public parks* or historic districts, those portions of *zoning lots* used for cemetery purposes, statutes, monuments, bridges or any structures owned by or on land owned by city, state or Federal governments or their agencies.

The grant of any special permit authorizing the transfer and use of such development rights shall be in accordance with all the regulations set forth in Section 74-791 (Requirements for application), 74-792 (Conditions and limitations), and 74-793 (Transfer instruments and notice of restrictions).

\* \* \*

#### 74-791

##### Requirements for application.

An application to the City Planning Commission for a grant of a special permit to allow a transfer of development rights and construction based thereon shall be made by the owners of the respective *zoning lots* and shall include: a site plan of the landmark lot and the adjacent lot including plans for all *development* on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. The application shall be accompanied by a report from the Landmarks Preservation Commission.

A separate application shall be filed for each independent "adjacent lot" to which development rights are being transferred under this Section.

#### 74-792

##### Conditions and limitations.

1. For the purposes of this Section, except in C5-3, C5-5, C6-6, C6-7 or C6-9 districts, the "basic maximum allowable *floor area*" for a *zoning lot* occupied by a landmark shall be the maximum *floor area* allowed by the applicable district regulations on maximum *floor area ratio* or minimum required *open space ratio* and shall not include any additional *fill or area* allowed for *plazas*, *arcades*, or *plaza* connected open areas or any other form of bonus whether by right or special permit.

2. The maximum amount of *floor area* that may be transferred from any *zoning lot* occupied by a landmark building shall be computed in the following manner:

(a) the basic maximum allowable *floor area* that could be built for *buildings* other than *community facility buildings* under existing district regulations on the same *zoning lot* if it were undeveloped.

(b) less the total *floor area* of all *buildings* on the landmark lot.

(c) The figure computed from (a) and (b) above shall be the maximum amount that may be transferred to any one or number of adjacent lots. [The transfer once completed shall irrevocably reduce the amount of *floor area* that can be developed upon the landmark lot by the amount of *floor area* transferred. In the event that the landmark's designation is removed or, if the landmark building is destroyed, or if for any other reason the landmark building is *enlarged* or the landmark lot is redeveloped, the landmark lot can only be developed up to the amount of permitted *floor area* as reduced by the transfer.]

(d) Development rights to unbuilt but allowable *floor area* may be transferred from one or any number *zoning lots* occupied by a landmark building to one or any number of *zoning lots* adjacent to the

landmark lot so as to increase the basic maximum allowable *floor area* that may be developed on such adjacent *zoning lots*. For each such adjacent *zoning lot* the increase in *floor area* allowed under the provisions of its section shall in no event exceed the basic maximum allowable *floor area* by more than 20 per cent.

3. When "adjacent lots" are located in C5-3, C5-5, C6-6, C6-7 or C6-9 districts and are to be developed with *commercial buildings* the following conditions and limitations shall apply:

(a) the maximum amount of *floor area* that may be transferred from any *zoning lot* occupied by a landmark building, shall be the maximum *floor area* allowed by Section 33-120.5 for *commercial buildings* on said landmark *zoning lot*, as if it were undeveloped, less the total *floor area* of all existing buildings on the landmark *zoning lot*.

(b) for each such adjacent *zoning lot* the increase in *floor area* allowed by the transfer of development rights under this Section shall be over and above the maximum *floor area* allowed by the applicable district regulations.

(c) the Commission may require where appropriate, that the design of the *development* include provisions for public amenities such as, but not limited to, open public spaces, subsurface pedestrian passageway leading to public transportation facilities, plazas and arcades.

4. In any and all districts, the transfer once completed shall irrevocably reduce the amount of *floor area* that can be developed upon the lot occupied by a landmark by the amount of *floor area* transferred. In the event that the landmark's designation is removed or if the landmark building is destroyed, or if for any other rea-

son the landmark building is *enlarged* or the landmark lot is redeveloped, the lot occupied by a landmark can only be developed up to the amount of permitted *floor area* as reduced by the transfer.

5. As a condition of permitting such transfers or development rights, the Commission shall make the following findings:

(a) that the permitted transfer of *floor area* or [minor] variations in the front height and setback regulations will not unduly increase the *bulk* of any new *development*, density of population or intensity of use in any *block*, to the detriment of the occupants of *buildings* on the *block* or nearby *blocks* and

(b) that the program for continuing maintenance will result in the preservation of the landmark.

The City Planning Commission shall give due consideration to the relationship between the landmark building and any new *buildings* developed on the adjacent lot regarding materials, design, scale, and location of *bulk*.

The City Planning Commission may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area.

74-793

Transfer instruments and notice of restrictions

The owners of the landmark lot and the adjacent lot shall submit to the Commission a copy of the transfer instrument legally sufficient in both form and content to effect such a transfer. Notice of the restrictions upon further development of the [landmark lot] lot occupied by the landmark and the adjacent lot shall be filed by the owners of the respective lots in the place and county designated by law for the filing by the owners of the respective lots in the place and county designated by law for filing of deeds and restrictions on real property, a certified copy of which shall be submitted to the Commission.

118a

Both the instrument of transfer and the notice of restrictions shall specify the total amount of *floor area* to be transferred, and shall specify by lot and block numbers, the lots from which and the lots to which, such transfer is made.

119a

## **APPENDIX F**

### **Constitutional Provisions**

#### **AMENDMENT V**

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

\* \* \* \*

#### **AMENDMENT XIV**

SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JAN 18 1978

MICHAEL RODAK, JR., CLERK

**APPENDIX**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**No. 77-444**

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PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY  
CORPORATION, UGP PROPERTIES, INC.,  
*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,  
*Appellees.*

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On Appeal from the Court of Appeals  
of the State of New York

---

Jurisdictional Statement Filed September 20, 1977

Probable Jurisdiction Noted December 5, 1977

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**DOCKET ENTRIES IN THE SUPREME COURT OF NEW YORK  
(TRIAL TERM AND APPELLATE DIVISION)**

**County Clerk, New York County**

**Clerk's Minutes of Supreme Court Actions and Proceedings 1969**

INDEX No. 14763

**PENN CENTRAL TRANSPORTATION Co., Plaintiff**

AGAINST

**CITY OF NEW YORK, Defendant**

**ATTORNEYS: Dewey B., BP&W, 140 Brwy [Penn Central];  
Corporation Counsel, Municipal Bldg. [City of N.Y.]**

Month, Day, Year—Index Number Assigned

Oct. 7, 1969—Summons and Complaint

Oct. 7, 1969—Affidavit of Service

Dec. 24, 1970—Note of Issue

Aug. 18, 1971—Statement of Readiness

Aug. 24, 1971—Order P. I Time to Serve Interrogatories

Mar. 8, 1972—Consent to Withdrawal of Atty.

May 9, 1972—Order spec. File Brief Amicus Curiae  
granted

Sept. 6, 1972—Def'ts Reply Memo, Supp'l Proposed  
Findings, in File Folder

Jan. 21, 1975—Memorandum Decision and Large Envelope  
Exhibits

Jan. 21, 1975—Minutes (6 Volumes)

Feb. 4, 1975—Judgment #3001

Feb. 28, 1975—Notice of Appeal

Mar. 7, 1975—Notice of Appeal

April 18, 1975—Order of Severance  
 June 24, 1975—Exhibits  
 July 28, 1975—[init. SP] 2 Order Exhibits to Defendant  
 Apr. 8, 1976—Remittitur (4)  
 June 7, 1976—Notice  
 June 24, 1977—Remittitur (4)  
 Sept. 8, 1977—Notice of Appeal

PENN CENTRAL ET AL UGI PROPERTIES,  
*Plaintiff-Respondent*  
 against

CITY OF NEW YORK, ET AL,  
*Defendant-Appellant*

Dewey, Attorney for P-R UGI  
 Bernard Richland, Attorney for D-A  
 White & Case, Attorney for P-R Penn Central

N.Y. Co. & Court—Saypol, J.

Index No. 14763/69

Notice of Appeal 3/7/75 & 2/28/75

Date—Aug. 14, 1975

Date—Aug. 15, 1975

Record Filed (22 copies); Printed 4 vols & 2 entered;  
 Judgment Order, 1 entered

Jan. 21, 1975—serving Pltf. cause of action

Feb. 4, 1975—awarding judgment to Pltfs.

Aug. 14, 1975—Note of Issue for Appellant Brief,  
 Oct. 75 Term

Sept. 25, 1975—Respondent Brief

Oct. 14, 1975—Reply Brief

Other—Aug. 28, 1975—Amicus; Sept. 2, 1975—Amicus  
 Sept. 3, 1975—[illegible]

Oct. 21, 1975—Argument (No. 1305, 1306), Stevens  
 Markewich Kufferman Murphy Lupiano

Dec. 16, 1975—Decision—O & J reversed on law. \$60 C & D  
 to App. Opinion by Murphy, J; All concur except  
 Markewich, J, & Lupiano, J, (opinion) who dissent.  
 (SOON)

April 7, 1976—Order of reversal settled and filed.

April 7, 1976—Remitted (No. 628A) to 60 Centre St.

## MOTIONS

Date		Date
Aug. 28, 1975—Amicus granted		Oct. 31, 1975
Sept. 11, 1975—Adj. to Nov. 75 Term		Nov. 13, 1975
June 23, 1977—C/A. Affd Opinion by Breitel, C.J.		Nov. 13, 1975

JACOBS, PERSINGER &amp; PARSONS

DOCKET ENTRIES IN THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

[485] PENN CENTRAL TRANSP'N Co. &amp; ORS. (As)

vs.

CITY N.Y. &amp; ANO.

Order Appealed from 5 6 76 (1st)

Order Granting lv

Notice of Appeal 6 7 76 (s)

Statement 500.2 6 17 76 (OK)

Record 8 26 76 (4 Vol's) (24+1)

File

Apptsbrf 8 26 76 (24+1)

Respbrf 1 17 77 (19+1)

AC (Com'e to Save Grand Central Sta) 2 11 77 (19+1)

Replybrf 3 30 77 (19+1)

AC AG 2 25 77 (19+1)

Requests 60 day card 7 6 76

Motions 1 6 77—Mot. withdrawn

92 AC (AG) granted—file in 20 days (Tu 8 Fe 77)

94 AC (Com'e Save Grand Central Sta) granted—file in  
20 days (Tu 8 Fe 77)

Corres'e 2 9 77 Ltr fr A cfmext A to 3 14 77.

[ATTORNEYS]

A Dewey, Ballantine, Bushby, Palmer &amp; Wood

140 Broadway NYC 10005

139 344 8000

for UGP Properties, Inc.

John Friedman Jr. cc City Att's

write confirming letter

White & Case  
 14 Wall Street NYC 10005  
 139 732 1040  
 for Penn Cent, NY & Harlem  
 Rys & 51st St Realty  
 R. W. Bernard Richland  
 Corp. Counsel, NYC  
 Municipal Bldg.  
 NYC 10007

[485a] PENN CENTRAL TRANSP'N Co & ORS (As)

vs.

CITY NY & ANO.

SCHEDULED FOR ARGUMENT: 4 27 77

ARGUED BY: A—John C. F. Wood (Both appellants)  
 R—Leonard Kaerner

DECIDED JUNE 23, 1977

12 21 76 Ltr to Dewey &c. accepting stip'n received  
 inoffice 12 17 76 setting 1 14 77 for R and 2 14 77 for reply.  
 Motion to preclude R is marked withdrawn.

DECISION: Order affirmed, with costs. Opinion by Breitel,  
 Ch.J. All concur. 6/23/77

REM SENT TO: NY Co. Clerk  
 60 Center St.  
 NYC 10007

DATE: 6/23/77

### Complaint.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK

[SAME TITLE]

Plaintiffs Penn Central Transportation Company, The  
 New York and Harlem Railroad Company, The 51st Street  
 Realty Corporation and UGP Properties Inc., by their at-  
 torneys, allege as follows:

#### FIRST CAUSE OF ACTION

1. Plaintiff Penn Central Transportation Company is a  
 corporation organized and existing under the laws of the  
 Commonwealth of Pennsylvania and has a general office  
 at 466 Lexington Avenue, Borough of Manhattan, City,  
 County and State of New York. All references to Penn  
 Central Transportation Company hereinafter made and  
 concerning any time prior to February 1, 1968, relate to  
 The New York Central Railroad Company which was  
 merged into the Pennsylvania Railroad Company (the  
 name of which was later changed to Penn Central Trans-  
 portation Company) as of February 1, 1968.

2. Plaintiff The New York and Harlem Railroad Com-  
 pany is, and at all times hereinafter mentioned was, a cor-  
 poration organized and existing under the laws of the State  
 of New York, and has a general office at 230 Park Avenue,  
 Borough of Manhattan, City, County and State of New  
 York. Approximately 95% of the stock of The New York  
 and Harlem Railroad Company is, and at all times herein-  
 after mentioned was, owned by Penn Central Transporta-  
 tion Company.

*Complaint.*

3. Plaintiff The 51st Street Realty Corporation is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York, and has a general office at 466 Lexington Avenue, Borough of Manhattan, City, County and State of New York. The 51st Street Realty Corporation is, and at all times hereinafter mentioned was, a wholly-owned sub-subsidiary of Penn Central Transportation Company.

4. Plaintiff UGP Properties Inc. is, and at all times since its formation on December 5, 1967 was, a corporation organized and existing under the laws of the State of New York, and has a general office at 277 Park Avenue, Borough of Manhattan, City, County and State of New York.

5. Defendant The City of New York (the "City") is a municipal corporation of the State of New York.

6. Defendant The Landmarks Preservation Commission of the City of New York (the "Commission") is a commission of the City of New York, established pursuant to Subsection 25-a of Section 20 of the General City Law, and Local Law 46 of the City of New York for the year 1965, which amended the Charter of the City of New York and the Administrative Code of the City of New York so as to add to each of them a new Chapter 8-A entitled "Preservation of Landmarks and Historic Districts" (the "Landmarks Law").

7. The subject matter of this complaint is Grand Central Terminal (the "Terminal") and the land on which it stands (the "Property").

The ownership and leasehold interests in the Terminal and the Property, held by the respective plaintiffs, are as follows:

(a) The New York and Harlem Railroad Company owns the fee.

*Complaint.*

(b) Penn Central Transportation Company has a lease, expiring in the year 2274 A.D., from The New York and Harlem Railroad Company.

The interests referred to in the foregoing subparagraphs (a) and (b) have been as there described at all times hereinafter mentioned.

(c) The 51st Street Realty Corporation has a grant of term, from Penn Central Transportation Company, coterminous with the lease referred to in the following subparagraph (d).

(d) UGP Properties Inc. has a lease, hereinafter described, from The 51st Street Realty Corporation, under which UGP Properties Inc. is to erect and operate a multi-story office building on the Property.

Penn Central Transportation Company, The New York and Harlem Railroad Company and The 51st Street Realty Corporation are hereinafter collectively called "Penn Central." UGP Properties Inc. is hereinafter called the "Lessee."

8. The Property is located in the heart of Manhattan, in one of the most valuable commercial areas in the world, and in the midst of a host of multi-story office buildings and similar structures.

9. The Property, presently improved with the Terminal, is in fact zoned for other structures as well, including in particular multi-story office buildings. Penn Central's rights in regard to such utilization of the Property, including in particular the space above the street grades, are recognized and defined in the applicable zoning law and regulations with mathematical precision. Application of the prescribed mathematics, including the Floor Area

*Complaint.*

Ratio and the Height and Setback requirements, shows that Penn Central is entitled to construct on the Property an office building at least fifty-six stories high. The Terminal occupies but a small fraction of the space, above the street grades, which Penn Central is thus by law entitled to utilize.

10. The entire mid-Manhattan area in which the Property is located, running from about 40th Street to 57th Street and from Fifth Avenue to Third Avenue, is likewise zoned for multi-story office buildings. Owners and lessees of many of the parcels of land in that area have already utilized their rights in full or substantially so. Others are now in the process of doing so, or are planning to do so.

11. Penn Central has determined to exercise its right to improve the Property with a multi-story office building. To that end The 51st Street Realty Corporation has entered into an Agreement of Lease (the "Lease") with the Lessee, under which the Lessee is to erect and thereafter to operate a multi-story office building on the Property. The Lessee is to pay rent to The 51st Street Realty Corporation at the rate of \$1,000,000 net per year in respect of the period between the commencement date of the Lease and the completion of the building; and thereafter is to pay rent at a rate which will never be less than \$3,000,000 net per year and may be more, depending upon the amount of the Lessee's income from the building. It is estimated that the Lessee's net income from the building, after its completion, will be at least \$5,000,000 per year. The Lease is for a term of 50 years after its commencement date, and the Lessee has an option to renew for another 25 years thereafter. The Lessee has commissioned Marcel Breuer and Associates, one of the world's most renowned architectural firms, to design the building.

*Complaint.*

12. On August 2, 1967 the Commission, acting under the purported authority of the Landmarks Law and having previously held a hearing, and over Penn Central's objection, designated the Terminal a landmark and the Property as its landmark site.

13. Such designation having been made, the Landmarks Law purports to make it unlawful, and subject to criminal penalties, to do anything with either the land or the building which would in any way change the exterior of the building, without the Commission's permission.

14. Further, the Landmarks Law purports to impose upon Penn Central an affirmative and apparently perpetual obligation to keep the exterior of the Terminal in good repair, at Penn Central's own expense and without reimbursement or compensation.

15. Thus continuously since August 2, 1967 the Commission, acting under the purported authority of the Landmarks Law, has imposed prohibitions and restrictions on Penn Central's use of the Property. In particular, the Commission has continuously since January 22, 1968 (the date of the Lease) prevented and prohibited Penn Central and the Lessee from going forward with the building provided for in the Lease.

16. The Landmarks Law makes available to the plaintiffs two procedures for seeking the Commission's permission to construct a multi-story office building on the Property. The plaintiffs have pursued and exhausted both of these procedures. In both cases the Commission has refused to grant the requested permission.

17. The first of such procedures is to request a "certificate of no exterior effect." In order for the plaintiffs

*Complaint.*

to be in a position to make that request, the Lessee commissioned Marcel Breuer and Associates to design a structure which would leave the Terminal, including its exterior as well as the Main Concourse, substantially undisturbed; but which, through an innovative architectural concept, would rise above the Terminal without making any physical change in the exterior thereof.

This design ("Breuer I") was not regarded by the plaintiffs as the most suitable structure from an economic point of view. Rather, it represented a genuine effort by the plaintiffs to afford to the Commission the opportunity to accomplish the substance of the objectives of the Landmarks Law, without attempting to inflict upon a single piece of private property the enormous costs which give rise to this present lawsuit.

On July 18, 1968 the plaintiffs submitted Breuer I to the Commission and applied for a certificate of no exterior effect to enable them to build it. After holding a hearing the Commission on September 20, 1968 denied the application.

18. The other procedure made available to the plaintiffs by the Landmarks Law for seeking the Commission's permission to construct a multi-story office building on the Property is to request a "certificate of appropriateness."

On January 20, 1969 the plaintiffs applied for that certificate, and submitted a design for a building which, externally, would be entirely new.

This design (which with the minor modifications made during the proceedings before the Commission is herein-after called "Breuer II") has been the subject of extensive consideration and comment by the architectural profession and others, and widely acclaimed.

Marcel Breuer and the plaintiffs regard Breuer II as the truly appropriate building, architecturally and commer-

*Complaint.*

cially, for this prime location at the center of the world's greatest city.

The plaintiffs, in their application for a certificate of appropriateness, also resubmitted Breuer I to the Commission, as an alternative. While noting their strong preference for Breuer II, the plaintiffs continued to express their willingness to go forward with Breuer I in order to bring about the accommodations referred to in paragraph 17 above.

After holding hearings the Commission on August 26, 1969 denied in its entirety, and as to both alternatives, the plaintiffs' application for a certificate of appropriateness.

19. The only other procedure provided for in the Landmarks Law, for seeking the Commission's permission to build, is to make an "insufficient return" application—i.e., to request a "certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return."

By the terms of the Landmarks Law itself, this procedure is available to others similarly situated but is not available to the plaintiffs.

20. The "landmark" character of the Terminal is highly debatable and at best doubtful. The aesthetic quality of the south facade is obscured by its engulfment among narrow streets and high-rise buildings. It is hardly seen at all except for a short distance to the south on Park Avenue, and even here the view of the facade is intersected by the encircling roadway and by the tall buildings that line Park Avenue. Moreover the Terminal is set against the back drop of the harsh and contrasting lines of the Pan-Am Building which appears to hang over the Terminal and to dwarf it.

*Complaint.*

21. There is a widely held view that what is most notable and worth preserving about the Terminal is not its exterior but its interior—i.e., the Main Concourse. In connection with their application to the Commission for a certificate of appropriateness the plaintiffs specifically offered to commit themselves not merely to preserve but also to restore and maintain the Main Concourse. The Commission rejected the offer.

22. Essentially the only legislative standard contained in the Landmarks Law, for the guidance of the Commission in determining which of the thousands upon thousands of structures in the City shall be designated as landmarks (and thus subjected to the drastic prohibitions and restrictions of the Law) and which ones shall not, is that "any" improvement, thirty years old or older, may be designated by the Commission as a landmark if it "has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation."

23. The Landmarks Law and the Commission's acts in purported reliance thereon deprive Penn Central of rent at the rate of \$1,000,000 per year in respect of the period commencing on January 22, 1968 and continuing until the date when the building provided for in the Lease would in normal course and in the absence of such prohibitions and restrictions have been completed.

24. The Landmarks Law and the Commission's acts in purported reliance thereon further deprive Penn Central of rent at the rate of at least \$3,000,000 per year, in respect of the period after the building would in normal course have been completed, and continuing until such prohibitions and restrictions are set aside or restrained.

*Complaint.*

25. The Landmarks Law and the Commission's acts in purported reliance thereon deprive the Lessee of income at the rate of at least \$5,000,000 per year commencing as of January 22, 1968 and continuing until such prohibitions and restrictions are set aside or restrained.

26. With respect to other owners of landmarks a point is reached, under the procedures provided for in the Landmarks Law, where just compensation is to be paid by the City for the takings of private property for public use that are involved in the application and enforcement of the Landmarks Law. Unless such compensation is paid, the Commission is required to permit the otherwise lawful use of the property, through issuance of a "notice to proceed."

With respect to the plaintiffs, these procedures are unavailable, and no point ever can be reached under the provisions of the Landmarks Law at which compensation to the plaintiffs is to be provided for and paid; nor has the City or the Commission in any other way provided for or offered to pay compensation to the plaintiffs.

27. The deprivations of property described in paragraphs 23, 24 and 25 above constitute the real economic cost of preserving the exterior of the Terminal as a landmark and thus of forwarding the objectives which the Commission deems to be embodied in the Landmarks Law.

Such benefits, if any, as may derive from such preservation are for the public as a whole; but the Landmarks Law and the actions of the Commission thereunder extract the entire cost from the plaintiffs alone.

28. On September 2, 1969 the demands and claims upon which this action is founded were presented by the plaintiffs to the Comptroller of the City of New York for adjustment; and for more than 30 days after such present-

*Complaint.*

ment the Comptroller has neglected and refused to make an adjustment or payment thereof.

29. As applied to the plaintiffs, the Landmarks Law and the actions of the Commission thereunder go beyond the scope of any permissible regulation and constitute a taking of the plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, most particularly Amendments 5 and 14, and the Constitution of the State of New York, most particularly Article I, Section 7.

30. The plaintiffs have no adequate remedy at law for the irreparable harm inflicted upon them.

## SECOND CAUSE OF ACTION

31. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 28 and 30 of this complaint.

32. The Landmarks Law and the actions of the Commission thereunder have heretofore deprived, are now depriving and until set aside or restrained will continue to deprive the plaintiffs of their property without due process of law, in violation of the Constitution of the United States, most particularly Amendment 14, and the Constitution of the State of New York, most particularly Article I, Section 6.

## THIRD CAUSE OF ACTION

33. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 7, 12, 13, 28 and 30 of this complaint.

*Complaint.*

34. The designation of the Terminal as a landmark and of the Property as its site, and resulting subjection thereof to the prohibitions and restrictions contained in the Landmarks Law, constitutes a taking of the plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, most particularly Amendments 5 and 14, and the Constitution of the State of New York, most particularly Article I, Section 7.

## FOURTH CAUSE OF ACTION

35. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 28 and 30 of this complaint.

36. The Landmarks Law denies to the plaintiffs the equal protection of the laws in violation of the Constitution of the United States, most particularly Amendment 14, and the Constitution of the State of New York, most particularly Article I, Section 11.

## FIFTH CAUSE OF ACTION

37. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 28 and 30 of this complaint.

38. The Landmarks Law attempts to provide for an administrative prescription of the aesthetically good, and is unconstitutional because it fails to provide adequate legislative standards by which the Commission is to make such decisions or by which the action of the Commission can be judged, and is an unlawful delegation of legislative authority, in violation of the Constitution of the United States,

*Complaint.*

most particularly Amendment 14, and the Constitution of the State of New York, most particularly Article I, Section 6 and Article III, Section 1.

## SIXTH CAUSE OF ACTION

39. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 7, 12, 13, 14, 28 and 30 of this complaint.

40. Within the Terminal there are various railroad facilities, including passenger terminals, passenger ticket offices, switch yards, and other transportation equipment and facilities, which Penn Central uses in intrastate and interstate carriage of passengers.

41. The railroad facilities located within the Terminal and used in both intrastate and interstate commerce are subject to the regulatory jurisdiction of the New York Public Service Commission pursuant to the provisions of the Public Service Law of the State of New York and of the Railroad Law of the State of New York, and the regulatory jurisdiction of the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, U.S.C.A., Title 49.

42. Under Section 50 of the Public Service Law of the State of New York, the Public Service Commission is given the power to order repairs or changes in terminals or terminal facilities. The legislative body of the City of New York is expressly forbidden, under Section 11 of the Municipal Home Rule Law, to adopt any law which applies to or affects any provision of state law providing for regulation or elimination of terminal facilities within the City of New York.

*Complaint.*

43. The Landmarks Law has no application in respect of the Terminal or the Property, and the Commission's actions are null and void.

## SEVENTH CAUSE OF ACTION

44. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 28, 30, 40, 41 and 42 of this complaint.

45. The Landmarks Law, as applied in respect of the Terminal and the Property, has a substantial adverse effect upon Penn Central's operations and charges as an interstate carrier, and constitutes an unreasonable burden upon interstate commerce, in violation of the Constitution of the United States, most particularly Article I, Section 8.

WHEREFORE, the plaintiffs pray that this Court enter its judgment:

1. Declaring that the Landmarks Law, as applied to the plaintiffs, violates the Constitution of the United States and the Constitution of the State of New York; that neither the City nor the Commission had or has any power or jurisdiction to enact or enforce such Law, through designation of the Terminal as a landmark or otherwise; and that such Law is null and void and of no force or effect in regard to the plaintiffs or the Terminal or the Property.

2. Permanently enjoining the defendants from using or threatening to use the Landmarks Law or any provision thereof or any action or regulation thereunder to prevent, impede, obstruct or in any way have any bearing with respect to the construction, use and occupancy, on the Property, of Breuer I or Breuer II or any other structure which

*Complaint.*

may otherwise lawfully be erected on the Property or any other use which may otherwise lawfully be made of the Property.

3. Declaring that the prohibitions and restrictions imposed by the defendants, during the period between the designation date (August 2, 1967) and the date when all such prohibitions and restrictions shall have been finally set aside pursuant to this Court's order, constitute a temporary taking of the Property for which just compensation must be paid by the City; and ordering the City to pay such compensation, computed at the rates set forth in paragraphs 23, 24 and 25 of this complaint.

4. Granting to the plaintiffs such other and further relief as to this Court may seem just and reasonable.

Dated: New York, New York  
October 7, 1969

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

MURRAY DRABKIN

WHITE & CASE

Attorneys for Plaintiffs

**Verified Answer.**

**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF NEW YORK**

[SAME TITLE]

Defendants, answering by their attorney J. Lee Rankin, Corporation Counsel, respectfully allege:

FIRST: Deny that they have any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "1", "2", "3", "4", "7", "9", "10", "11", "23", "24" and "25" of the complaint.

SECOND: Deny each and every allegation contained in paragraphs "13", "14", and "15" of the complaint, and respectfully refer the court to § 207-4.0, § 207-9.0, § 207-10.0 and § 207-16 of the Administrative Code of the City of New York for the full text and meaning thereof.

THIRD: Deny that they have any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "17" of the complaint, except admit that on July 18, 1968 plaintiffs submitted "Breuer I" to the Commission and applied for a certificate of no exterior effect to enable them to build it, and that after holding a hearing the Commission on September 20, 1968 denied the application.

FOURTH: Deny that they have any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "18" of the complaint, except admit that on January 20, 1969 plaintiffs applied to the Commission for a certificate of appropriateness and submitted "Breuer II" and resubmitted "Breuer I", and that

*Verified Answer.*

after holding hearings the Commission on August 26, 1969 denied in its entirety, and as to both alternatives, the plaintiffs' application for a certificate of appropriateness.

FIFTH: Deny each and every allegation contained in paragraph "19" of the complaint, and respectfully refer the Court to § 207-8.0 of the Administrative Code of the City of New York for the full text and meaning thereof.

SIXTH: Deny each and every allegation set forth in paragraphs "20", "22", "27", "29", "32", "34", "36", "38", "43", and "45" of the complaint.

SEVENTH: Deny each and every allegation set forth in paragraph "21" of the complaint except admit that the Commission rejected plaintiffs' application for a certificate of appropriateness.

EIGHTH: Deny each and every allegation contained in paragraph "26" of the complaint, and respectfully refer the Court to § 207-8.0 of the Administrative Code of the City of New York for the full text and meaning thereof, except admit that neither the City nor the Commission has in any way provided for or offered to pay compensation to the plaintiffs.

NINTH: Except as hereinbefore admitted or otherwise pleaded, deny each and every allegation repeated and alleged in paragraphs "31", "33", "35", "37", "39", and "44" of the complaint.

AS AND FOR A FIRST FULL, COMPLETE AND SEPARATE DEFENSE,  
THE DEFENDANTS ALLEGE:

TENTH: The membership of the Landmark Preservation Commission includes among others architects, realtors, an historian, a city planner, and an attorney.

*Verified Answer.*

ELEVENTH: The Landmark Preservation Commission has conducted extensive studies of places and buildings in the City of New York for the purpose of designating such places and buildings as landmarks and historic districts.

TWELFTH: An exhaustive study of Grand Central Station was conducted by the Landmarks Preservation Commission for the purpose of determining if Grand Central merited designation as a landmark.

THIRTEENTH: A public hearing on the proposed designation of Grand Central was held on May 10, 1966, and was continued to subsequent meetings of the Commission and closed January 31, 1967.

FOURTEENTH: The plaintiff New York and Harlem Railroad Company, and New York Central Railroad Company, appeared by its attorney, at the public hearing and fully presented its views to the Landmarks Preservation Commission regarding the proposed designation of Grand Central as a landmark.

FIFTEENTH: A memorandum to the Commission wherein the plaintiff's position regarding the proposed designation was extensively set forth was submitted.

SIXTEENTH: The Landmarks Preservation Commission after considering all of the evidence found that among all its important qualities, Grand Central is a magnificent example of French Beaux Arts architecture, that it is one of the great buildings of America, that it represents a creative engineering solution of a very difficult problem, combined with artistic splendor, that as an American Railroad Station it is unique in quality, distinction and character, and that this building plays a significant role in the life and development of New York City.

*Verified Answer.*

SEVENTEENTH: On August 2, 1967 the Landmarks Preservation Commission designated Grand Central a landmark.

EIGHTEENTH: On October 7, 1969, the Landmarks Preservation Commission and the City of New York were served with a copy of the complaint.

NINETEENTH: The right to review the factual determination made by the Commission in designating Grand Central a landmark, in that it found that Grand Central has a special character, special historical and aesthetic interest and value as part of the development, heritage, and cultural characteristics of New York City, did not accrue within four months before the commencement of this action, and is, therefore, barred by the limitation of time contained in Section 217 of the Civil Practice Law and Rules which provides that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the interested party.

AS AND FOR A SECOND, FULL, COMPLETE AND SEPARATE DEFENSE,  
THE DEFENDANTS ALLEGE:

TWENTIETH: The defendants repeat and reallege each of the allegations contained in paragraphs "10" through "17" of this complaint.

TWENTY-FIRST: On July 18, 1968 application was made to the Landmarks Preservation Commission by plaintiffs for a Certificate of No Exterior Effect for work to be done at Grand Central Terminal (hereinafter referred to as "Breuer I").

TWENTY-SECOND: After holding a hearing, the request was denied by the Commission on September 20, 1968.

*Verified Answer.*

TWENTY-THIRD: On January 20, 1969 the Landmarks Preservation Commission received the application of plaintiffs for a Certificate of Appropriateness for the work that had been proposed under the application of July 18, 1968 ("Breuer I"), as well as for an alternative proposal (hereinafter referred to as "Breuer II").

TWENTY-FOURTH: On April 10, 11 and 14, 1969 a hearing was held as advertised and testimony was presented as to "Breuer I" and "Breuer II".

TWENTY-FIFTH: Plaintiffs submitted further revised proposals to the Commission on June 23, 1969, and a final and complete set of drawings was received on August 1, 1969 (hereinafter referred to as "Breuer II" Revised).

TWENTY-SIXTH: A hearing was held on August 5, 1969.

TWENTY-SEVENTH: It was agreed that, except insofar as testimony was directed towards an element in which "Breuer II" specifically differed from "Breuer II" Revised, all oral and written arguments received at or subsequent to the April 1969 hearing might be considered by the Commission in reaching its determination.

TWENTY-EIGHTH: The Commission, after careful consideration, on August 26, 1969 denied plaintiffs' application for a Certificate of Appropriateness as to both "Breuer I" and "Breuer II" Revised.

TWENTY-NINTH: The proceedings of the Landmarks Preservation Commission in designating Grand Central as a landmark, and in denying plaintiffs' applications for a Certificate of No Exterior Effect and a Certificate of Appropriateness were in all respects in accord with the law.

*Verified Answer.*

WHEREFORE, defendants ask for a judgment of this Court declaring:

1. The designation of Grand Central a landmark is valid and constitutional.
2. The Landmark Law as applied to plaintiffs is valid and constitutional.
3. That the Landmark Law is valid and constitutional.
4. That the defendants have the costs and disbursements of this action and such other relief as this Court deems just and proper.

J. LEE RANKIN  
Corporation Counsel  
Attorney for Defendants

Dated: New York, N.Y.  
November 5, 1970

(Verified by Harmon Goldstone on November 5, 1970.)

**TESTIMONY**

[20] FREDERICK ROVET, residing at 2 Gramatan Drive, Yonkers, New York, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows.

**DIRECT EXAMINATION**

BY MR. STEWART:

Q. Mr. Rovet, what is your present occupation? A. I am Assistant Vice President real estate of Penn Central Transportation Company.

Q. Do you hold any other positions with the Penn Central? A. I'm an officer and director of the 51st Street Realty Corporation. I am also president of the Realty Hotels, Inc., the company which operates Penn Central's four hotels, the Biltmore, Barclay, Roosevelt and Commodore Hotel.

Q. Do you hold a position with the New York & Harlem Railroad Company? A. No, I do not.

THE COURT: I don't think he was around then.

THE WITNESS: I was an officer and director in April of this year and I resigned.

[21] THE COURT: But you weren't around when it was New York & Harlem Railroad?

THE WITNESS: It still is.

Q. Are you a lawyer? A. Yes, sir.

Q. When were you admitted to practice? A. In December of 1956.

Q. And was that in New York? A. Yes, sir.

Q. When did you join the Penn Central? A. August 6 of 1956 I joined the General Counsel's office of the New York Central Railroad Company.

Q. And what jobs have you had since then down to date? A. I was an attorney from December of 1956. Two years

after that I received different titles, but remained an attorney until October 31st of 1968 in the General Counsel's office of the New York Central Railroad Company and then subsequent to merger, the Penn Central Transportation Company.

. . .

[24] BY MR. STEWART:

Q. And what building did these plans provide for? A. Provided for an office building over the existing Grand Central Terminal.

Q. How many stories? A. I believe it was 20 stories.

Q. Was any provision made in the terminal [25] building itself for supports for this building? A. Yes. The present terminal building has foundations which were designed to accommodate the 20-story office building over the terminal. They are still located in the Grand Central Terminal today.

. . .

[64] THE WITNESS: If I may try to describe it more accurately, your Honor, you're concerned with the place where OTB now occupies the former ticket windows, you're concerned with the westerly side of the ticket windows that you referred to before, you're concerned with the interior of that ticket office, until you reach the waiting room on the southerly side. The tower would proceed, under the terms of the lease—

THE COURT: All right, those rented facilities are subject to termination in the event of the consummation of this lease.

THE WITNESS: Yes.

THE COURT: That's your testimony.

THE WITNESS: Yes.

. . .

[66] Q. Does the Railroad pay any real estate taxes on the land on which Grand Central Terminal is located? A.

The Railroad presently is not paying real estate taxes pursuant to an order of the Federal Court in Philadelphia, pursuant to which the Penn Central is in reorganization.

. . .

[70] Q. Under the lease, Exhibit 2, who is responsible for paying real estate taxes? A. UGP Properties, Inc. would be obligated to pay as additional rental 100 per cent of the tax on the new building, 100 per cent of the tax on that portion of the old building which is within an area defined under the lease as the enclave, and 100 per cent of the tax rate applied to the total assessment on the land of Parcel A.

. . .

[84] THE COURT: And so between the two million [85] four total available here, total usable area, legal usable area, and the actual area used, you're got about two million plus square feet to give away?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Now, I understand it.'

MR. STEWART: This chart, your Honor, just to make it probably unnecessarily clear was prepared not primarily to indicate what size building could be put on the Grand Central site, but, rather, to indicate what portion of the air rights could be transferred to another location.

. . .

[96] Q. I hand you Plaintiffs' Exhibit 11 for identification and ask you, Mr. Rovet, who prepared that? A. This exhibit was prepared under my jurisdiction and supervision.

Q. And is the information contained therein true and correct? A. The information is correct.

Q. And taking the first page or the heading on the left as "property subject to long-term ground leases," which properties are those on the plaintiffs' exhibit?

THE COURT: I can see at once, Mr. Stewart.

If I may interrupt you, the details of the occupancy shown on Plaintiffs' Exhibit 10 are detailed, as I say, on Plaintiffs' 11 for identification; is that the short of it?

MR. STEWART: That is correct, sir.

. . .

[99] THE COURT: That is shown on the legend. I take it the only available properties for transfer of their air rights are in red. They are not subject to ground leases or contracts of sale?

THE WITNESS: That's correct, your Honor.

THE COURT: You have complete control there. All right.

The only ones available for transfer are the red buildings. The Biltmore is one of them. That is No. 2 in Plaintiffs' Exhibit 10?

THE WITNESS: Yes, your Honor.

. . .

[101] THE COURT: Just clear me on this.

In what circumstances is the transfer, air rights transfer, available, adjacent properties?

These rights cannot be sold, is that right? They cannot be conveyed, as a matter of bargain and sale?

THE WITNESS: I think they can be conveyed, your Honor, provided the owner, as defined in the zoning law, which includes not only a fee owner but an owner of a term of 50 years with one renewal of 25 years, provided that owner and the owner [sic] of the candidate for transfer are the same.

THE COURT: In other words, the idea is to obviate hardship.

THE WITNESS: Yes.

THE COURT: Is that singular to the Landmark Law or is it applicable in other circumstances?

THE WITNESS: It may be applicable in other circumstances.

[102] THE COURT: In other words, forget for a moment that we're involved with the landmark problem.

As the owner of Grand Central Station, as a matter of hardship, could you conceivably or legally avail yourself of that unused area?

THE WITNESS: We could.

THE COURT: —With some other adjacent site?

THE WITNESS: We could do that without using the Landmark Law.

THE COURT: Assume Grand Central Station was not designated as a landmark area—

THE WITNESS: Yes, sir.

THE COURT: —could you utilize the unused air rights on some other property that you own, on some other adjacent property that you own, increasing the otherwise available area?

THE WITNESS: Yes, your Honor, only in one case, and that would be the Commodore Hotel, which is marked as No. 7 on this exhibit.

THE COURT: As an adjacent site.

THE WITNESS: Yes.

. . .

[140] THE COURT: Let's take the Biltmore.

. . .

[141] THE COURT: Now, if you took the Grand Central rights and transferred them, what did you do?

THE WITNESS: You could add the two million one over Grand Central to that seven seventy-nine, assuming that

you could get bonuses, and you'd have a monumental figure of two million eight.

THE COURT: That's a pretty big building.

THE WITNESS: Yes.

THE COURT: A lot of space.

THE WITNESS: It would be like an obelisk.

[142] THE COURT: What's wrong with that?

THE WITNESS: It would be infeasible to go beyond a certain number of floors because you'd have to have one elevator bank going all the way up to the top and you'd find that the lower floors were almost fully covered by elevators, so there comes a point of no return in building a structure like that.

It seems to me that you have to stop at 59 stories or 60, and beyond that it's economically infeasible to go.

. . .

[148] Q. With respect to the Roosevelt Hotel, Plaintiffs' Exhibit 14 indicates that the lot area is the same as that for the Biltmore.

Do the same considerations apply with respect to the transfer of the air rights to the Hotel Roosevelt site as you have testified applied in the case of the Hotel Biltmore except for this series point? A. Yes, sir.

. . .

[151] THE COURT: You said that would be with a 52-story building?

THE WITNESS: More than 70, your Honor.

THE COURT: What about the Roosevelt in 1968?

THE WITNESS: The considerations are almost exact, your Honor, as the Biltmore.

. . .

[169] Q. In your direct testimony, Mr. Rovet, you testified that in 1962 the Railroad considered the use of the waiting room for a bowling alley, is that correct? A. That's what I testified to, yes.

Q. Now, since that time, has the Railroad ever considered the use of the waiting room for [170] any other commercial purpose? A. No, we regarded ourselves as being frustrated.

Q. You regarded yourself as being frustrated since 1962, is that it? A. Yes.

. . .

[183] Q. Isn't it a fact that the decision to [184] build on the Biltmore site was not made public because of the feared effect upon the labor force in the Biltmore Hotel? Is that a fact or not?

. . .

A. There was no decision ever to build on the Biltmore site.

Q. Has there been any attempt, since 1970, to discuss building on the Biltmore site with any of the defendants? A. Yes.

Q. When were those discussions had, if you know? A. In the latter part of 1970 and the early part of 1971, UGP Properties, Inc., and the Railroad attempted to negotiate a lease of the Biltmore site, but the lease never came to fruition, we never came to terms.

THE COURT: You mean a lease with a prospective builder. [185] THE WITNESS: With UGP Properties, Inc., your Honor.

Q. Are those the only discussions had with respect to building on the Biltmore site other than what you just told us? A. Yes, absolutely.

THE COURT: Who are the principals in UGP?

THE WITNESS: Morris Saady is the President of the UGP Properties, Inc.

THE COURT: He has no connection with the plaintiffs as such.

THE WITNESS: Other than being the President of one of the plaintiff companies.

THE COURT: Not part of the New York Central complex.

THE WITNESS: No, sir.

THE COURT: When these discussions went on with Saady of UGP about building on the Biltmore site, did that include a consideration of the transfer of the Grand Central air rights?

THE WITNESS: Oh, yes, sir.

[186] THE COURT: Go ahead.

How far did those discussions get, can you tell me that?

THE WITNESS: They were bogged down in considerations of the rent. Saady would not pay the \$5,000,000 rent that I referred to previously in my testimony, your Honor, because he felt it was too high to make the project feasible.

THE COURT: What were the details of the project, do you know? What did he propose to do? What did he have in mind? Did he say?

THE WITNESS: He had in mind making the transfer, knocking down the Biltmore and putting up a large office building on the Biltmore site.

THE COURT: How large? How high?

THE WITNESS: I've forgotten, your Honor. I believe it's something like 59 to 61 stories.

THE COURT: Office building?

THE WITNESS: Yes, your Honor.

[187] THE COURT: You wanted \$5,000,000.

THE WITNESS: We wanted \$5,000,000 for the combination.

We also wanted certain indemnities in the event that the project would not go through, in order to make us whole on the Biltmore Hotel.

THE COURT: You mean five million a year.

THE WITNESS: Yes.

THE COURT: How many years?

THE WITNESS: We would want that \$5,000,000 for an initial term of at least 50 years with a renewal of 25 years subject to increasing for hedges against inflation over the term.

THE COURT: The other parties make a counter-offer?

THE WITNESS: They made counter-offers from time to time but we regarded them as—

THE COURT: How near five million a year did they come?

THE WITNESS: Not close at all.

THE COURT: Do you know how much [187A] was offered?

THE WITNESS: Three million seven, three million eight.

. . .

[200] HERBERT BECKHARD, residing at Red Spring Lane, Glen Cove, Long Island, New York, called as a witness on behalf of the plaintiffs, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. STEWART:

Q. Mr. Beckhard, what is your occupation? A. I'm an architect.

Q. Where do you work? A. I work in the firm of Marcel Breuer & Associates, located at 635 Madison Avenue, New York.

Q. Is that a partnership? A. It is.

Q. Are you a partner? A. I'm a partner.

Q. When did you become a partner? A. In 1964.

Q. When you join the organization? A. In 1951.

Q. Would you tell us your professional training? A. I went to the Pennsylvania State University, studied architectural engineering there and did graduate [201] work at Princeton University in 1949 and '50.

. . .

[382] Q. Did you prepare any plans for any construction on any alternate site in the Grand Central area for UGP other than the site on Grand Central Terminal? A. Yes.

Q. Where was that site? A. We investigated several sites, starting with the Commodore, then the Roosevelt Hotel site, 466 Lexington Avenue site, and lastly, the site of the Biltmore Hotel.

Q. Did you prepare plans for all these sites? A. To varying degrees of thoroughness.

Q. Was the Biltmore site the most advanced set of plans you had? A. Yes.

Q. What degree of planning did you reach with [383] the Biltmore plans? A. A state comparable to these three projects.

Q. And what date did you prepare those plans? A. I don't recall the exact date.

Excuse me, you have the drawings in evidence. If you would let me look at the drawings, I could give you the date.

These drawings bear the date 15 December 1969.

Q. Are those the only drawings you prepared for construction on the Biltmore site? A. These were not drawings for construction.

MR. NESPOLE: Question withdrawn.

Q. Are those the only plans you prepared for building on the Biltmore site? A. Well, we prepared quite a few sketches and we discussed with the Planning Commission whether or not we would have a park on Madison Avenue or one of the side streets. We went through quite a few sessions with them in deciding things of that nature.

We discussed a bridge with them, and so on, and this represents the final product, I guess.

Q. Do those plans reflect the total number [384] of floors? A. Yes.

Q. Do they reflect the distribution of arcades, plazas, and so forth? A. Yes.

Q. Were these part of the conversations had with the representatives of the City Planning Commission? A. Yes.

Q. According to plans, what was the gross building size for the building on the Biltmore site? A. Again it was approximately two million.

. . .

[385] Q. Did these plans assume the transfer of the development rights over Grand Central Terminal to the Biltmore site? A. Yes.

. . .

[434] MURRAY DRABKIN, residing at 1814 24th Street, N.W., Washington, D.C., called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. STEWART:

Q. What is your occupation? A. I'm a lawyer.

Q. When were you admitted to the Bar? A. I was admitted to the Bar of the District of Columbia in 1953 and to the Bar of the State of New York, I believe it was in 1966.

Q. Are you an officer of UGP Properties, one [435] of the plaintiffs in this case? A. Yes, I am.

Q. What is your position? A. I'm vice president and secretary to the corporation, and general counsel.

. . .

[444] Q. Taking that procedure in account, was UGP in a position to use that procedure to attempt to obtain permission to transfer? A. Not at any point. It is necessary to have not only an originating site—and by that I mean the [445] landmark site which generates the air rights—which, of course, UGP had under its lease with the Railroad, but it also must have what I would call a transferee site.

UGP's only property interest in Manhattan throughout this entire matter has been its leasehold interest on Grand Central Terminal. It did not have at any point, and does not have now, a possible transferee site.

. . .

[463] THE WITNESS: Yes, we are co-plaintiffs in this, and the discussions were with myself and UGP.

THE COURT: Whatever you say, using the word "amenable," applies to Penn Central.

THE WITNESS: We work as a team, the Penn Central people and ourselves.

THE COURT: All right, that would not have been an obstacle, if something agreeable had been arrived at.

THE WITNESS: Correct.

THE COURT: What happened after that?

You now have this zoning resolution, is that right, and does it contain the provisions that were directed toward this problem?

THE WITNESS: The Planning Commission staff then went about getting the resolution adopted, and our position was, that is, we made no commitment that we would, in fact, build this building or that building.

[464] We investigated various buildings with them and we said, if it was feasible, we would do so, and so in December of '69, the change in the law was, in fact, enacted, and after it was enacted we continued to investigate in considerable depth and considerable expense the possibility of transferring the air rights to any number of alternative sites.

THE COURT: It never worked out.

THE WITNESS: Every site we investigated turned out to have obstacles which resulted in it not being an acceptable substitute, even a reasonable substitute for what we have. Indeed, it turned out that none of them were really feasible.

THE COURT: The transfer of air rights is available if you picked a suitable site.

THE WITNESS: Well, they're available, I think, in a highly risky and speculative way.

Could I take a moment and go through some of the problems that confronted us in this regard?

To say that the transfer is available is [465] easy, but when you start trying to work it out, you really run into some very serious problems.

. . .

[467] Now, we, as a developer, have to make a choice about whether we're going to try to transfer air rights.

We have 2,000,000 square feet of air rights on Grand Central Terminal, and we start thinking about where we could possibly transfer and how long and what are the problems.

First of all, it requires a special permit from the Landmarks Preservation Commission, from the City Planning Commission.

In order to get that special permit, we first have to satisfy the Landmarks Commission that this is a program for continuing maintenance of the landmark, which is satisfactory to them, and what that constitutes and what the cost of it will be is entirely up in the air and conjectural.

Secondly, we have to satisfy the City Planning Commission that the transfer will not result in undue density or not result in an increase in bulk or any of these other things [468] that are stated in the statute; and then, if we've satisfied the staff as to that, the matter then goes to the City Planning Commission, which by majority vote can decide either way on the thing.

If it survives the City Planning Commission, it then is subject to hearings before the Board of Estimate, and the decision by the Board of Estimate as to whether it will authorize the transfer.

Now, in that kind of proceeding, there is often many a slip between the cup and the lip, and for the developer such a procedure is fraught with peril and risk.

When you add to that the fact that the transfer, once made, is irrevocable, you have some real problems which are far less than a full right to develop.

• • •

[469] THE COURT: Who made the suggestion?

THE WITNESS: Mr. Robertson of the Planning Commission that we transfer F.A.R. to the Biltmore or Roosevelt Hotel or 466 Lexington Avenue or the Commodore Hotel. We systematically [sic] examined every one of these proposals. Let's look at the Biltmore and Roosevelt and these present very similar problems.

Suppose, in fact, we had managed to get all of the approvals required by this statute, we would have then proceeded to build a building of some 2,000,000 square feet or attempted to build a building of some 2,000,000 square feet on a site which was 43,000 square feet. That means that that building would have had to have gone out to the building line on at least three sides, and it would have had to go up about 60 stories.

I think the number was, in fact, 63, if my recollection serves me correctly. The streets around the Biltmore and the streets around the Roosevelt are narrow streets, if you will recall 45th, 46th, Vanderbilt and Madison, and it seemed [470] to us that there was a tremendous risk that an owner of a neighboring building would take a look at this statute, and so, well, how could we say that this building does not unduly increase the bulk of a new development with regard to air rights? How can we not say that the transfer of air rights to this new site does not result in density of population or undue density in the use of the block, with the result, your Honor, that we would have been confronted with taxpayers' suits by neighboring property owners, which would either have prevented or totally impeded or totally prevented this development.

Now, I mentioned earlier irrevocability. We would then find ourselves in the net position of having transferred the air rights from Grand Central, and if the taxpayer—a taxpayer's suit, with air rights irrevocably transferred to that site, and never be able to develop these, with risks which seemed to us that a developer ought not to take. They were certainly not a substitute for what we had at Grand Central.

THE COURT: Continue.

[471] Q. I take it from your testimony that during 1969 and 1970 you were actively considering the possibility of transferring air rights.

You indicated two reasons which suggest how UGP felt about this, that is, the delays and uncertainty in the administrative process and also the risk, serious risk of taxpayers' suits.

Are there any other general considerations that went into your planning? A. Yes. Another important consideration, of course, was that of obtaining vacant possession. At Grand Central we had a site in which we could obtain vacant possession in which we could proceed with development within 90 days.

Each of the concessionaire leases at Grand Central have a clause which allows the railroad to terminate on 90 days' notice. So, once we had the go ahead we could begin construction no later than 90 days thereafter.

On the other hand, if you look at the alternative site, you don't have that kind of thing. At the Roosevelt Hotel, if my recollection serves me correctly, I believe there were then leases outstanding until—

[472] THE COURT: We have that in the record. We already have that.

THE WITNESS: There were also problems of vacant possession in the Biltmore and at the Commodore. So that—and at 466, where I believe there were also space leases outstanding.

. . .

Q. With respect to the Hotel Commodore, did you encounter any problems with respect to the possible transfer of air rights to that site?

. . .

[473] THE WITNESS: There were, of course, the general problems to which I have already alluded, the problems of getting vacant possession, the administrative obstacles, the possible taxpayers' suits and the Commodore presented a special problem in its sub-surface conditions.

As was mentioned earlier, the Commodore sits astride the loop track of the Penn Central system. It also sits astride two levels of the subway system, the Flushing line and the Lexington Avenue, and these presented enormous problems in construction and in time and course, which seemed to us to be insurmountable.

BY MR. STEWART:

Q. Were there any other considerations with respect to the Biltmore site other than those you just mentioned?

Were there any financial considerations? [474] A. Yes. There were certainly very serious financial considerations at the Biltmore site. The Biltmore is a going hotel. It is, in fact, one of the most profitable of hotels which is owned by the railroad. Its earnings over the past few years range anywhere from about—I think the low is probably around a million two up to perhaps a million eight; in that range; and if we were to build an office building on that site it would have been necessary for us to, in fact, acquire a going business; it would have been necessary for the railroad to give up a going business.

Now, people are willing to give up going businesses if they get a good enough price for them, and this was, in fact, reflected in the railroad. It's a position on the Biltmore.

We conducted extensive and serious negotiations with the railroad in the hope that we could acquire a site and make this thing work. Our attitude was not negative about it. Our attitude was constructive and positive. We wanted to make it work, we wanted to go ahead with the building if we could [475] possibly do it. So we spent an awfully long time dickering back and forth with the railroad to try to work out a lease that we could live with, and when the whole thing broke down finally, the last figure that we had was \$5,000,000 a year rental for the Biltmore Hotel. That, plus the other obstacles, just made it a completely unacceptable risk.

Q. Did the— A. Excuse me. My I just add one thing which might give us some perspective?

At Grand Central we were talking about a rental which was around three million as opposed to a rental of around five million for a site which we could not consider to be nearly as attractive.

The economics of it are more important not only in terms of what it cost us but also in terms of what we could hope to get out of it. We start out with a big minus on the Biltmore site and we start out paying perhaps \$2,000,000 a year more in rental.

On the other side of the ledger it was our view that we could get anywhere from 50 cents to a dollar a square foot more rent on the Grand Central Terminal site. Well, let's say it isn't 50 cents or [476] a dollar. All right, take the difference of perhaps 75 cents a square foot. So, two million square feet times 75 cents a square foot is a million and a half dollars a year.

It was our view that the Grand Central Terminal site would produce perhaps a million and a half dollars a square foot more than the Biltmore, in addition to which the Biltmore would cost us \$2,000,000 more in rental. So there was a three and a half million dollar disadvantage that you start out with on the Biltmore site compared to Grand Central.

I would add a couple of more considerations. We were prepared to go ahead with Grand Central in 1968. The zoning transfer which would have allowed us to move ahead on the Biltmore, if it were feasible, did not pass until the end of 1969. If everything had gone perfectly and if we had been able to go ahead with the Biltmore, it would not have been until well into 1970 because of the administrative procedures that we had to go through.

By that time real estate ratings had gone up, operating costs had gone up; none of these things [477] could have

been reflected in escalation clauses as they would have been at Grand Central, with the result that there would have been a substantial additional difference in the cost of doing the Biltmore, in the course of operating the Biltmore, all of which would have inured to the detriment of the landlord, and, finally, at the Grand Central site we had this building with the spectacular views down Park Avenue right on top of Grand Central Terminal, a unique and a very distinguished office building, and we think—we think that the vacancy problem which you have to take into account with these buildings, of course, would have been considerably less than it would have been at the Biltmore.

So we are talking in hard dollars and cents, an economic disadvantage on the Biltmore site, which was well over \$4,000,000, plus the intangibles of vacancy rates, and things of that sort, all of which militated against it.

Overall, in economic terms, this was just a completely unacceptable level of risk and it could hardly be considered to be a substitute for Grand [478] Central Terminal for which it was offered.

Q. Did the Railroad indicate that they would want any indemnity with respect to the Biltmore? A. Yes, the Railroad did indicate that, and this is another one of those problems that confronted us in the course of these negotiations. The Biltmore is a going hotel. The Railroad took the position that once it became public knowledge that the Biltmore would get torn down, the hotel business would completely deteriorate, and the reason for this is that that hotel, like the Biltmore, there is considerable dependence on the convention business, and that kind of business is booked one to three years in advance.

If a convention manager is faced with the prospect that a hotel is going to—may be torn down, he isn't likely to book his convention there. So the Railroad took the position, with considerable justification, that they could not possibly take

the risk that a transfer would not materialize or that the developer, for some reason, would otherwise be unable to go forward with the project.

The Railroad, therefore, insisted that before it would allow a transfer of air rights from [479] Grand Central to the Biltmore or the Roosevelt, the developer would have to enter into an indemnity or a liquidated damages provision, if you will, which would compensate them for the possible loss of business as a result of the announcement that the building might get torn down.

And I think the amounts that we talked about were very, very large. They ranged anywhere from a half million to \$2,000,000, depending upon the period of time involved. So that if we had applied for the transfer and for any reason the Planning Commission or the Board of Estimate had turned us down, UGP would have had to pay over to the Railroad as much as a half million dollars to \$2,000,000.

Q. Were the considerations with respect to the Roosevelt any different from those with respect to the Biltmore? A. They were substantially the same, Mr. Stewart, with, perhaps, one position additionally, and that is the Roosevelt is further away from the transportation hub. It does not have as ready access to Grand Central, although there is a rather narrow passageway to the Terminal, but it was certainly a less attractive site in terms of proximity to the [480] transportation hub.

Q. And you mentioned one other building, 466 Lexington Avenue.

What about that one? A. 466 Lexington Avenue is the old headquarters of the New York Central Railroad. We looked into that problem. We instructed our architect to look into 466 as we, indeed, instructed them to look into all of those other sites, and it soon became very apparent that the Railroad had substantial problems with giving up that building because of the location there of the very ex-

tensive railroad communications and computer network, which, I think, was discussed at some length here before, I don't see any need for me to dwell on it.

Q. Mr. Rovet testified that when the Railroad—that the Railroad offered all of its properties in the Grand Central Terminal area for sale last year and that UGP had submitted bids on the Roosevelt and the Biltmore.

Did you, in fact, submit bids on the Roosevelt and the Biltmore?

. . .

[481] Q. Did the Railroad offer its properties in the Grand Central Terminal area for sale in 1971? A. Yes, it did.

Q. Approximately when? A. I believe it was about the middle of the year.

Q. And did UGP submit bids on any of those [482] properties? A. Yes, UGP did submit some bids.

Q. And what were your bids? A. UGP submitted two alternative package bids. The first—the first package bid was for the—for the fee interest in air rights at Grand Central—the fee interest in the Grand Central development site. It has all those things which were included in the enclave in parcel A, and the Biltmore, that is—it was a package bid for the Grand Central Terminal area, plus the Biltmore.

The second alternative bid, in the event that the first was rejected, was for the Grand Central development site and the Roosevelt. These were both package bids in the sense that both the air rights and the hotel would have to be accepted, or neither.

Q. How much did you bid on each? A. We bid three and a half million dollars for the Grand Central development area or the air rights. In each bid—It was the same in both bids, and we bid \$11,650,000, I believe, for the Biltmore, and we bid \$9,000,000 for the Roosevelt.

Q. And were your bids accepted? [483] A. Both of our bids were rejected.

Q. Why did you submit these bids? A. We submitted the bids for these reasons: Our present interest in Grand Central Terminal is that of a lessee. The Railroad was putting on the block—strike that—was putting up for sale the fee interest in those rights. It seemed to us that this was a good occasion to try to round out our interest in those air rights in the development at Grand Central.

The lease relationship is a complicated one. Much turns on its administration. We know who we had when we had the railroad and we had worked out a pretty good working relationship. We do not know who we would get if somebody else acquires the air rights, so we thought it would be a protective measure and perhaps a good opportunity to purchase the fee interest. We thought we would rather be our own landlord, so we bid on the air rights, and that was our primary interest in making these bids.

Q. Why did you include in each of your bids the two hotels, or one hotel, and one bid and the other hotel in the other bid? [484] A. Well, the reason we included the hotel—the hotels is that we recognize that litigation is uncertain. We hope that we will prevail in our challenge to the Landmarks restrictions.

On the other hand, we were concerned with the possibility that we might not prevail. We have invested thus far a very large amount of money in developing the Grand Central site, in architectural fees, in development fees of various kinds, in the course of a \$1,000,000 deposit which we have had with the Railroad now since 1968, I believe. This has been an expensive undertaking and it was our thought that if we were ultimately unsuccessful, we would like to be able to salvage something out of this long-term effort of ours so that our bid for the hotel was really in the nature of a salvage operation.

It would have allowed us to, at least, have a hotel on the site. It would have allowed us a number of options. We might have been able to do a building, perhaps a smaller

building, on the site, but, at least, it would have given us some sort of salvage out of this effort. It was not a substitute for Grand Central Terminal.

• • •

[513] THE COURT: Can we sum it up this way, that in order to avoid the confiscatory experience, this availability of air rights as was proposed, it was your position that after air rights became available as a matter of amendment to this statute, the position of your people was that economically you couldn't utilize them, you couldn't utilize the air rights, the transfer of air rights from your economic advantage, so you remained in the same position as you were originally economically, and the position is that the property was being taken without compensation?

THE WITNESS: Your Honor, I wish I could have said it that briefly. That is essentially it.

• • •

[530] Q. When did your discussions with representatives of the City Planning Commission and the Office of Midtown Planning commence in respect to developing the concept of building on the Biltmore site, do you know? A. Well, first, I think we have to make a distinction which I can't make, and that is the distinction between the City Planning Commission staff and the Office of Midtown Planning did not exist when this project was initiated. I believe that the Office of Midtown Planning was created somewhere down the road, and the same players were involved on both teams, so I don't know at which point they were wearing which uniform.

Q. When did your discussions with the representatives of the City Planning Commission commence in respect to developing the concept of building on the Biltmore site? A. As near as I can put it, there were generalized discussions about building on a number of alternative [531] sites which included the Biltmore site, and I think those discussions began around the time of the hearings on our certificate

of appropriateness before the Landmarks Preservation Commission.

Q. UGP retained Mr. Max Siegel of 1841 Broadway, did it not, to assist in the formulation of the zoning resolution regarding transfer of development rights? A. Yes.

Q. When did you retain Mr. Siegel? A. Mr. Siegel had been retained—well, I think I should revise that answer. Mr. Siegel was not retained for the purpose of assisting in the drafting of the zoning resolution. Mr. Siegel had been retained by UGP before I came aboard. He had been retained—he was already retained by UGP when I became associated with the project, and he was retained as a zoning consultant to UGP to provide it with advice on what it could or could not do on designing the building.

Q. When was he retained, do you know? A. He was retained before April 1968. Whether it was in January, February or March, I don't know. I wasn't there.

Q. You say you reviewed a certain draft of Mr. [532] Siegel with respect to a proposed amendment to Section 74-79, is that correct? A. I think I reviewed more than one draft.

Q. Do you know if Mr. Siegel ever submitted a draft of a proposed resolution to the City Planning Commission for their consideration? A. I believe that he did.

Mr. NESPOLE: May I have this marked for identification, your Honor? If the Court pleases, may I also have the envelope marked?

THE COURT: Is it important? Do you need it?

Mr. NESPOLE: The man's name is on it.

THE COURT: If there will be no issue as to its source, then it seems unnecessary.

Mr. NESPOLE: All right.

(Draft of Zoning Resolution by Max Siegel, marked Defendants' Exhibit A for identification.)

Q. Mr. Drabkin, would you take a moment and look through Defendants' Exhibit A for identification.

(Short pause.)

Q. Have you read through Defendants' Exhibit A for identification, Mr. Drabkin? A. Yes.

[533] Q. Is that the draft that Mr. Siegel submitted to the City Planning Commission in respect to the proposed amendment to Section 74-79? A. I don't know whether this is the draft that Mr. Siegel submitted or not. This is pretty much the law as it is now.

Q. You don't know of your own knowledge if that is the draft that was submitted with your approval. A. I don't know whether this was the draft that Mr. Siegel submitted or not. I recall that Mr. Siegel submitted to me a draft which was substantially the same as this or may have been the same as this, which I reviewed and which I said under the circumstances would be acceptable to us.

. . .

[559] WYLIE F. L. TUTTLE, residing at Mayfair Lane, Greenwich, Connecticut, called as a witness on behalf of the plaintiffs, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY Mr. STEWART:

Q. Mr. Tuttle, what is your occupation? A. I am president of Collins, Tuttle & Company, a real estate company.

Q. Could you tell us a little bit more about the operations of Collins, Tuttle & Company? Where is it located and what does it do? A. Collins, Tuttle & Company is a Delaware corporation. Our main office is at 261 Madison Avenue. It's a trademark for a series of corporations which engage in the real estate business and brokerage management, investment, and promotion. We have operations outside of New York, in Chicago, Illinois, in Los Angeles, and

in Paris, France. We are specialists in the, among [560] other things, specialists in the development and promotion and management of the construction of speculative office buildings.

Q. When did you join Collins, Tuttle & Company? A. I formed a predecessor partnership called Collins, Tuttle & Company with my late partner, Arthur Collins, on July 1, 1954. I assumed the presidency of the company in 1958 upon his death.

. . .

[584] Q. With respect to those three factors, I want to ask you how they apply with respect to the proposed building on the Grand Central Terminal site—first, with the location. A. There is no location in the United States of [585] America, in my judgment, which will be more attractive to the headquarters of major national corporations, to law firms, accounting firms, the companies that serve and support those major national corporations. There would be no more attractive location in the United States of America, in my judgment, than this building and its address.

. . .

[617] Q. So what was your conclusion as to the economic feasibility of going ahead at the Biltmore site? A. I wanted to finish with the financing. I couldn't get, without tenants, I couldn't get financing, particularly, again, the three factors, I had to get a much higher rental level. The market was nowhere near as good. The site was nowhere as good and a very important factor is that the ground rent was \$2 million higher and that became, by a long shot, the highest ground rent ever paid, and that was a serious factor, mitigating, and I was unable, and I tried for two years—the companies with whom I worked, not just the companies who were willing to furnish me the financing in 1968 for 175 Park Avenue, but I went to just about every source that was imaginable, domestic and even foreign. I went to the City of New York's [618] Comptroller's Office,

I went to the State of New York's Investment Office, I went to the New York State Teachers' Retirement Association, I went to the fifty major insurance companies, I tried to put together a consortium of savings banks, New York savings banks. They have an organization. I tried to get them to do it on the basis that they would be helping New York by having this building built.

I tried just about every imaginable way—I tried every way that I could imagine, and I have a good imagination, I think, to get this—

THE COURT: Shall we stop and take a vote?

Q. I think you've made the point, Mr. Tuttle. So, is it a fair statement—a fair summary of what you have been saying that it was your conclusion that this proposal was not economically feasible? A. Yes, sir.

. . .

[684] LAWRENCE GAINES, residing at 140 Fallon Avenue, Elmont, New York, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. STEWART:

Q. Mr. Gaines, what is your occupation? A. Vice president for Cushman & Wakefield, Inc., 529 Fifth Avenue.

THE COURT: A little louder, please.

THE WITNESS: 529 Fifth Avenue, New York, New York, primarily engaged in the appraisal of real property in the Metropolitan area of New York and throughout the country.

. . .

[727] Q. Now, I hand you Plaintiffs' Exhibit 10. You will notice that many of the buildings are colored in yellow, which, of according to the code at the [728] top of the page are properties subject to long term ground leases.

Would it be feasible to purchase the ground lease—strike that question.

You'll also notice that all of the properties colored in orange are also subject to long term ground leases except for No. 4, which is 52 Vanderbilt Avenue.

Now, if you will look at building No. 20, 245 Park Avenue, would it be feasible to purchase the ground lease at that site and then using air rights from the Grand Central Terminal site, redevelop that location, that is, 245 Park Avenue, with a new building? A. No.

Q. In this connection I also hand you Plaintiffs' Exhibit 11 where the ground lease at 245 Park Avenue is described. A. No. This is a new office building over a million square feet in it, I believe, and it certainly would not be feasible to purchase the ground lease for redevelopment.

Q. Why not? [729] A. We have the highest and best use of the property, in my opinion, with the existing structure.

Q. Would you explain that, please? A. Well, it's the best use that you could put to the land site, and it would return the greatest return on your investment. You would derive the greatest future benefits from that.

Q. Now, would you also look at Exhibit 10, at the other sites on Park Avenue, which includes No. 21, No. 22, 24, and then running across to the other side of the street, 12, 13, 14, 15, 16 and 17, and would you also examine Exhibit 11 which describes the ground leases on those locations and tell us whether it would be feasible to buy the ground leases at those locations and redevelop the site, using air rights in Grand Central Terminal? A. It would not be feasible to purchase the air rights under these Park Avenue buildings for the purpose of redevelopment—

Q. You said to purchase the air rights. A. The underlying ground lease. For the purpose of redevelopment of property and demolishing these massive structures, including new office buildings, we have long term which they themselves are undoubtedly encumbered profitably, I presume,

with long term leases to major corporate tenants, and then redevelop the same site with the same building, it would be the same type of building—would be suicide.

• • •

[738] THE COURT: We're still sitting here the same as we started this talk between us, and that is, I take it, really, you wouldn't know what to do with these air rights outside of the plan to utilize it over Grand Central Station.

THE WITNESS: Outside of the plan to utilize the air rights over Grand Central Station, the owner of these air rights would have a problem conveying them—I should use the word "conveying" them—utilizing them—on another site at a price anywhere near the price which he could receive from the conveyance or leasing of the air rights over the existing site.

This results from the lack of marketability at the time of the particular market because of the particular market in 1969 and '70, the discounting effect which we would have to discount these air rights over the term of years that would be required to actually utilize them, [739] because there isn't a builder around that's going to pay you the full amount for those air rights until he's got a building up and producing income.

We've got to confront ourselves with a long period of time on each one of these sites. The minute we get into the area of pulling away from our immediate site, which is immediately available, which is the best site, in the best location available, at that particular time, and one of the bases for builders and one of the reasons that a market heats up is timing. A builder will build at an appropriate time. He will not build when timing is against him. This is the important aspect of putting up a building or an apartment house or anything. It's timing. You can't get away from timing. I'm putting my money up. I've got to produce a building within a certain length of time. If I've got to wait

four or five or six or seven or eight or nine or ten years to put that building up, I could put that money in the bank and accumulate an awful lot of money.

So, therefore I can only pay a discounted amount for that, and that discounting would run [740] havoc with the amount of money that somebody would be willing to pay for the total package that's available for sale over the period of years that it would take to develop it.

The idea that you can go in and just take two or three million square feet of available air rights and put it out immediately on the market and sell it immediately is a very difficult thing for me to comprehend.

• • •

[741] Q. Mr. Gaines, going back to the hypothetical questions which the Judge was asking you just before our recess, if UGP had come to you in '69 or 1970 and asked you your advice as to whether or not it was feasible to consider transferring these air rights to any of these sites which we have been discussing for redevelopment, what would your answer have been? A. That it was economically not feasible to do so.

Q. Now, will you take the Biltmore sites, specifically, and explain your answer. A. In the case of the Biltmore site, we have a 22-story operating hotel which is producing an income for the Railroad, and the Railroad's fee—not fee, but the Railroad rental would include the replacement to them of the loss of income from this hotel, were it conveyed to a third party who's to redevelop it. I was advised that the rental in total to any developer as at June 1970 would be approximately \$5 million, which is over \$1.00 a square foot more, I believe, or approximately \$1.00 a square foot more than the rental that would be charged over the Terminal.

In addition to that, this would involve the erection [742] of a major structure on a lot of 44,000-some-odd square

feet fronting on substantially narrower streets, as comparison to the development of the Grand Central Terminal site, which involved the erection of a building on a 146,000-plus square foot lot.

The Biltmore site not only involved the demolition of a substantial 22-story building, but it involved the elimination of certain leases which were in existence at that time and could delay the development of the project—protract it.

The economics with reference to operating expenses, rental value that might be attainable, the leasehold rent that was prescribed by the Railroad, or the owner of these rights, and the cost of construction, were of such a combination as to preclude the demolition and redevelopment of that site at that particular moment in time.

Q. What, in your opinion, is the maximum size of a viable building for that site? A. In my opinion, there was substantial FAR available within the site—

Q. Substantial— A. —FAR, floor area ratio, so that you could develop without any air rights almost 800,000 square feet of area [743] above grade—I think, approximately, 760,000-some-odd feet, adding in your lower area another 50 or 100,000 square feet additional, so you're going over 100,000 square feet.

To go over the million mark would put a burden on the site. Most buildings that run into a million four, a million five and a million two, or two million square feet, are situated on sites substantially larger than this site. This would require, from a point of view of construction, a substantial variance in the zoning code, and it's my understanding that this particular aspect of the project was discussed and that preliminary plans, or interim plans, were drawn which would have provided a tower structuring covering approximately 80 percent of the lot area, which was approximately 100 per cent more than you would normally be permitted under the existing code, or normal con-

struction, would run in the area of approximately 40 per cent.

This, in itself, creates a bulk hazard and confronts us with the probability, and a very reasonable one, that we would have objection, strenuous objection, from people in the area—Canadian Pacific Building and other Madison Avenue buildings, to this project, and at the very least [744] would have caused six months to a year delay which would have thrown us smack into the worst part of the rental market—in addition, the worst part of the mortgage market.

Confronted with these problems, a builder would have found himself in a position of making practically no return on his money. He'd have done better if he went into a bank and put it in a savings account as far as his net overall return was.

These are some of the factors that concern us with the Commodore Hotel, and this does not take into consideration an important factor, which we must never lose sight of, is the superiority of the location over Grand Central Terminal with its broad vista looking down Park Avenue, with its great distance from the Pan Am Building, with its unique stature as an office building potential, as an image-building for corporate headquarters, and also the flexibility because of 146,000 square-foot lot, of laying out a building for executive offices, in comparison with the laying out of a building on the Biltmore site, which would have more of a square shape, substantially more depth between the wall and the core, and substantially more lower real space, which would be—I mean, [745] lower rent in the sense of the type of client that would purchase that space, would want to pay a lower rental as the result of that one factor, also.

So that in any projection for the Biltmore site, we would have to reduce the rent, raise the ground rent, in-

crease the construction cost, increase the financial aspects of the project, and increase the vacancy allowance—and also throw in the probability that we are not ready to move ahead immediately as we were in the Grand Central Terminal, and in that respect we're talking about timing, which is the essential of the industry.

The availability of a piece of property, the ability to move ahead with your project, the ability to deliver within a prescribed period of time, these are very important functions to a builder, to a project developer, to a tenant renting space.

Q. Are the considerations for the Hotel Roosevelt the same as those you've just now stated with respect to the Biltmore? A. I would say the considerations are relatively the same except that the Biltmore Hotel has a closer proximity to Grand Central, 42nd Street. It's somewhat closer to subway transportation and it might command a slightly [746] better rental value than that which might be derived from the Roosevelt Hotel.

I don't recollect what the lease problems are, but there might be some longer term leases at the Roosevelt. I don't recollect.

Q. And what about the Hotel Barclay? A. Well, the Hotel Barclay, in this location, is a viable property, as I can see, and it is in a good location, it has good potential for development, in its present form—upgrading, or whatever else they might want to do.

It does not have the Park Avenue frontage because there is a new office building fronting on Park Avenue which blocks its development out in conjunction with a new Park Avenue building, which might have given some impetus to a higher rental.

Also, the fact of timing and leases preclude the economic development of the site in the latter part of '69 or at the

time we're talking about, '70, '71, because of the problems which might ensue.

Also, the fact that here again arises, that we have narrow streets on Lexington Avenue; we don't have as good a rental probability on Lexington Avenue that we even do on Madison Avenue, no less than that of 175 Park Avenue, [747] so that these are basic problems for a project that can not just be shunted off. You just cannot go out, pick up air rights and scatter them throughout the city without giving very intensive thought to the basic underlying economics of each individual building that these air rights are to be transferred to.

It's fundamental economics that's involved. It's dollars and cents and the bottom line that has to be reached. Many forces come into play in this, and one of the primary things, and I must go back to that, is timing. When you have a site that's available to go, you pretty well know what your problems are and you can face them. When you have sites that are not available to go, you don't know what's going to happen.

. . .

[883] FRANK MILANO, residing at 29 Turner Lane, Mt. Kisco, New York, called as a witness on behalf of the plaintiffs, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. STEWART:

Q. Mr. Milano, what is your occupation? A. I'm the regional controller of the metropolitan region of Penn Central Transportation Company.

THE COURT: Say that again, please.

THE WITNESS: Regional controller of the metropolitan region, Penn Central Transportation Company.

Q. What is the metropolitan region? A. The metropolitan region is concerned with the operation of passenger trains in and out of Grand [884] Central Terminal. It involves a service as opposed to strictly a geographical area.

Q. What are your responsibilities in that position? A. I'm responsible for the accounting costs and revenues in the metropolitan region.

Q. Does that include Grand Central Terminal? A. That's correct.

. . .

[887] A. They were prepared by members of my staff under my supervision at my direction.

. . .

Q. Now, the heading of each of these is "Grand Central Terminal." Exactly what is meant by that phrase? A. For purposes of this exhibit, it would include the station building and the subsurface area of the station building, including the platform.

Q. The title also refers to "Revenues & Costs." What costs are included? [888] A. Basically, these are costs of maintenance and maintaining and operating the station building.

Q. Does it include any revenues or costs with respect to transportation operations? A. No, sir.

. . .

[890] Q. Will you refer, please, to 35-B, the chart for the year 1971.

Please explain the first item, "Rents and Concession Revenues." A. These are the amounts that are received from tenants and concessionaires situated in Grand Central Terminal.

Q. Then turning to "Costs"—first, let me ask you, are there any other revenues or rents which are received from any source from the Terminal building, or is this all that there is? A. Well, there are revenues which are derived

from the sale of tickets, but, of course, they're not included in this statement.

Q. Turning now to "Costs of Maintenance & Operation," the next heading, would you take each item under the heading label and explain what each one is? A. The first item involves a force of employees who are concerned with maintaining and repairing the [891] station structure.

THE COURT: Excuse me. These things are self-explanatory. I don't think we have to have any detail, Mr. Stewart.

MR. STEWART: I think that's correct, your Honor. Let me just review them. There may be one or two that need explanation.

THE COURT: I think this is fully explanatory, Mr. Stewart, for the purposes of your case.

. . .

[896] Q. When was Plaintiffs' Exhibit 35A and 35B prepared, Mr. Milano? A. In the early part of this year.

Q. In the form that Exhibit 35A is before the Court, was that document in existence prior to that time? A. In this form? No, sir.

Q. Same as to 35B; is that correct? A. That's correct.

Q. You went through certain records of the Railroad and culled certain information, is that correct, from those records to put it together; is that correct? A. That's correct.

. . .

[898] Q. Tell me, has the Railroad ever considered utilizing the waiting room for commercial purposes? A. I understand it was considered several years ago, yes.

Q. Do you know when it was considered? A. I really don't know. I was in Detroit at the time it was under consideration, I believe.

Q. As controller of the Metropolitan Region, do you know if the Railroad has considered any plans for com-

mercial use of the waiting room space in the last five years?

A. I know of no specific situations, no.

. . .

[909] Q. Do you know that the Railroad has received that exemption since 1959? A. Yes, I do.

. . .

[910] Q. Under the column entitled, "labor, maintenance repair and service plant operation," under 35B, what specific crafts are included in that account? A. That includes such people as pipe fitters, sheet metal workers, iron workers, painters, carpenters, electricians. Most of them.

Q. Any other craft, sir? A. Ventilation cleaners or vent cleaners, plumbers, machinists, refrigeration operators, elevator machinists, masons—Did I mention that?

. . .

[913] Q. What are the recurring items of maintenance and repair that that labor account reflects? A. Recurring?

Q. Yes. A. There's always something that has to be done. I don't quite understand your question, Mr. Nespole.

Q. What items recur on a regular basis that are incorporated as a labor cost under that account? A. We've got plumbers, we've got carpenters. There is always something that has to be done. Just replacing light bulbs, I would imagine is quite a job.

Q. Doesn't that maintenance and repair item include costs related to the platforms? A. It may, yes.

Q. There are platforms that do not exist completely under the terminal, isn't that correct? A. The platforms do extend out possibly as far as 45th Street, but under ICC accounting the platforms are considered part of the station facility.

Q. Does the maintenance and repair account for labor there include costs for any work on any structures located outside of Grand Central Terminal [914] building? A. Outside of the building?

Q. Yes, sir. A. Well, we already talked about the possibility that they might work on the platforms, we talked about the possibility that they might be servicing the steam lines, which, of course, extend beyond the building boundaries. There is that kind of work that is included there.

Q. Are there any yard expenses subsumed in that account? A. There should not be.

Q. I agree there should not be, but are there any yard expenses subsumed in that account; do you know? A. There may be, Mr. Nespole. There may be some small amount where some of these people had to get out into, let us say, one of the towers, but they would be reasonably insignificant charges.

Q. Where are the yards located, Mr. Milano? A. I guess we've got a yard there around 49th Street. There's a yard, we call it the Madison Avenue yard, near below ground in the terminal complex.

[915] Q. How far north does the yard on Madison Avenue run, sir? A. I couldn't say.

Q. Does the Railroad use any space in the building for offices? A. In Grand Central Station? Yes, we do.

Q. Does the Railroad use any space in the building for storage? A. Probably some subsurface areas may be used for storage, yes.

Q. Do you use space for employee amenities? A. There are some small areas. There might be a locker room, I believe.

Q. Does the maintenance repair and service item include any costs related to maintenance of these areas that the Railroad uses in Grand Central Terminal? A. Yes, they would.

Q. Will you tell me approximately how much of that item is so included? A. No, I couldn't, but again I think it would be a relatively minor amount.

Q. Mr. Milano, in terms of the accounting [916] methodology employed here, does the maintenance repair and service account reflect the cost of only those items which

can be attributable to the income generated by the commercial use and concession use of the terminal? A. No, but I don't think they should be.

. . .

[919] Q. Were these statistics prepared for purposes of this litigation? A. Yes, sir.

. . .

[920] Q. Does the cleaning item reflected there relate to any costs involved in cleaning platforms? A. Probably not the platforms. I would probably—it probably would include the ramps to the platforms and possibly the stairs to the platforms.

Q. How about railroad cars? A. No, sir.

Q. Ticket booths? A. No, sir.

Q. Is there any space that the railroad utilizes in the building for its own purposes that you indicated earlier? A. Well, I guess it would include, for example, the cleaning of the station master's office and—

Q. Does the cleaning item there reflect only those items of cost which are attributable to the income generated by the rental and concession use of Grand Central Terminal? A. These costs represent the cost of cleaning Grand Central Station.

Q. The whole terminal, right? A. The whole terminal.

Q. The top to the bottom, right? [920-a] A. Yes.

Q. Are there any areas outside of the terminal that are cleaned which is subsumed in that account? A. I would say not.

. . .

[931] Q. Can you tell me what portion of that account is reflected in respect to cleaning the transportation portion of the terminal? A. How do you describe the transportation—

Q. Tell me, Mr. Milano, has there been any effort to allocate to the commercial use of the terminal a percentage of the total amount of water that's consumed in that terminal? A. No, sir.

Q. I direct your attention to "Other Direct Costs." I notice on the second sheet that item includes rubbish removal. Where is the rubbish removed from in Grand Central Terminal reflected in that cost item? A. All over the terminal building.

[933] Q. As to the "Overhead Charges," Item (E) on the second page, sir, those represent labor costs for supervisors involved in supervising the labor that is distributed under the Labor column, is that correct? A. Basically, that's it, yes.

Q. There has been no allocation of the supervision cost item there in respect to the commercial use of the terminal, has there, Mr. Milano? A. No, it followed the direct cost.

[942] Q. I believe you also testified that it was conceivable that some of the labor in this item might have been done in the yard.

Can you give us an example of the kind of work you were thinking of? A. Well, it would certainly not include any work on the tracks. There might have been a yard structure, a replacement of a light bulb in the yard structure, the replacement of a doorknob; something [943] of that nature could conceivably have been performed by some of these people under maintenance repairs and service plant operation.

Q. Is there any way to separate out such items of work if they had occurred? A. Under our present code structure there is not, but we considered it so minor that we never made the attempt to segregate such costs. They are relatively minor.

[997] BY MR. NESPOLE:

Q. Mr. Goldstone, what is your position with the City of New York? A. I am Chairman of the New York City Landmarks Preservation Commission.

Q. And when were you appointed chairman? A. On October 21, 1968.

[1006] Q. In respect to his Honor's question, Mr. Goldstone, in regard to thirty years from now, every [1007] building presently existing in the City of New York is eligible for landmark designation. Can you answer that question that the Court posed to you at this point, sir? A. I can answer it very clearly and both from policy and experience.

The Commission is highly selective in what it designates. I would imagine if I made a count through our files, we have rejected at least as much as we have designated, constantly getting requests to designate buildings that may have some local interest or some sentimental interest to a particular community or group, but are not of sufficient importance or not the best representative example or not the most viable example of the period that the Commission wants to maintain.

[1175] DONALD H. ELLIOTT, Chairman, City Planning Commission, City of New York, 2 Lafayette Street, New York, New York, called as a witness on behalf of the defendants, having been duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. NESPOLE:

Q. How long have you been Chairman of the City Planning Commission, Mr. Elliott? A. Since November of 1966.

[1186] THE COURT: Had Breuer I been passed upon at the time of that amendment?

THE WITNESS: I don't believe it had.

THE COURT: Let's start it this way.

As I understand it here, preceding the Grand Central Breuer No. I, by statute, by resolution of the Board of Estimate, an alternative was involved for the benefit of landowners who might be affected by the landmarks—by a landmark designation, in effect, to give such a landowner an opportunity to utilize the air rights which otherwise would be affected—which would be enjoined by the application of the landmarks law.

THE WITNESS: That's correct, your Honor, but it was after—I believe it was after Breuer I was first made public.

. . .

[1197] Q. Commissioner Elliott, the 1969 amendment was intended to expand the number of sites that could be the recipient of the Grand Central Terminal air right, [1198] was it not? A. It clearly was.

Q. There was no effort to, in any way, limit, was there? A. No, it did not. We certainly did not intend that.

Q. Are you familiar with the circumstances leading up to the enactment of the 1969 amendments to Section 74-79 of the Zoning Resolution? A. I am.

Q. Did the City Planning Commission have any discussions with representatives of the Penn Central or UGP concerning any proposals to amend Section 74-79 prior to its actual amendment in 1969? A. Yes.

Q. Can you tell us when these discussions were had and with whom? A. Well, there were numerous discussions which went on all through 1969 and in the latter part of 1968, and they were held between members of my department and representatives of Penn Central and of the developer and with the office of Midtown Planning & Development, and, of course, discussions also with the Landmarks Preservation Commission staff.

[1199] Q. Did any representatives of UGP or Penn Central ever submit to the City Planning Commission a proposed draft of the amendment? A. Yes. A representative of those organizations did submit such a proposal.

Q. Is that representative Mr. Max Siegel? A. He was.

. . .

[1202] Q. Mr. Elliott, did there come a time that Mr. Siegel told the City Planning Commission the purpose of the submission of Defendants' Exhibit A [1203] in evidence? A. We had been working with him and with other representatives of the plaintiffs on the details of this transfer legislation. That is why he redrafted the proposal, and there was a meeting which included a substantial number of the persons interested in this matter in September of 1969 when agreement was reached on the legislation.

. . .

[1205] Q. Has the City Planning Commission ever approved an air rights transfer under the 1969 amendment to Section 74-79? A. I'd have to check the records to be sure.

THE COURT: Do you know of any now?

THE WITNESS: We have discussed a number of them.

Q. Was the Amster Yard transaction ever approved? A. Yes, it was.

[1206] Q. And where is the Amster Yard located, sir? A. It's in—it's right in midtown Manhattan, and I can't give you the exact block, but it is on Second Avenue, and in a very—it's a sophisticated, very much loved historic district, low-rise district, and we did approve a transfer off of that district.

. . .

Q. Can you tell us the circumstances, as you recall them, of the Amster Yard transfers? A. The Amster Yard had a very substantial amount of unused air rights. It's a courtyard with small two story buildings around it, and the trans-

fer was to [1207] take the air rights off of that and to transfer them to an office building on the end of the block so as to—well, it's to use the rights which made it easier to preserve the Amster Yard and to continue its maintenance just as the statute provides.

Q. The transfer was approved, was it not? A. It was approved.

Q. The building was not built, however; is that correct? A. That is correct. The building was not built but the transfer was approved and was greeted very enthusiastically.

. . .

[1217] Q. After the amendment to Section 74-79 of the zoning resolution, did the City Planning Commission expect an application to transfer from Grand Central Terminal to the Biltmore site? [1218] A. We did. We worked out virtually all of the details of that application prior to the time the legislation was taken, the hearing, and subsequently passed.

THE COURT: You may tell me what the record is in your department of those activities and their status at the time the amendment was proposed. How far had it gone?

THE WITNESS: Well, it had gotten down to the discussion as to the location of the plazas, the location of the escalators, the question of whether there should be a one or two-foot setback on certain streets. What I would consider design details had been discussed at length by members of my department and presented to the Planning Commission for its review prior to the time that we took the legislation to public hearing.

THE COURT: Let me ask you this.

Assuming consummation of such an agreement between the parties, as the Landmarks Commission on the one hand and the plaintiffs on the other, the agreement to utilize the air [1219] rights over Grand Central on the Biltmore site,

did that require any formal action on the part of your Commission?

THE WITNESS: It would.

THE COURT: Would it require a hearing, too?

THE WITNESS: It would.

THE COURT: A public hearing.

THE WITNESS: A public hearing.

THE COURT: All right. It got to the point where, assuming that the amendment was adopted, you'd be ready to go to a hearing on the plaintiffs' proposal.

THE WITNESS: The proposal had been made in generalities in April of '69 and our testimony before the Landmarks Preservation Commission. The statute, when it was taken to hearing, was unopposed at the public hearing and passed the Board of Estimate in the same manner, and we were confident that any application which flowed from it would be treated exactly the same way.

THE COURT: So that now the situation is [1220] this, as far as the City is concerned—when I say the City, I mean the Planning Commission and the Landmarks Authority—were ready to have the proposal effectuated and then something happened, as a result of which nothing happened, is that it?

THE WITNESS: That is correct.

THE COURT: Go ahead, Mr. Nespole.

BY MR. NESPOLE:

Q. Mr. Drabkin, counsel for UGP in this case, the plaintiff, has testified that the transfer of development rights, once effected, is irrevocable.

Is such a transfer irrevocable under Section 74-79? A. If they use the rights on a transferee site, they can't come back and use them over again on the landmarks site.

Q. Other than under that set of circumstances, is the transfer ever irrevocable? A. If they don't use them, then it is not.

. . .

[1254] JACQUELIN T. ROBERTSON, Director of the Office of Midtown Planning & Development, City of New York, 220 West 42nd Street, New York, New York, called as a witness on behalf of the defendants, having been duly sworn, was examined and testified as follows:

[1255] DIRECT EXAMINATION

BY MR. NESPOLE:

Q. Mr. Robertson, what is your present position? A. I'm the Director of the Office of Midtown Planning & Development.

Q. How long have you held that position, sir? A. Since April of 1969.

Q. Were you employed by the City of New York prior to that time in any other position? A. I was a principal urban designer in the City Planning Commission.

Q. How long were you so employed, sir? A. Since the spring—May of 1967.

Q. What is your academic background, sir? A. I'm an architect. I was trained as a political scientist. I have a Bachelor of Arts degree in political science; a Master's degree in politics, philosophy and economics; and Bachelor of Architecture. That's it.

Q. Are you a licensed architect, sir? A. I am.

Q. Licensed by the State of New York, sir? A. Yes.

. . .

[1267] Q. Did you attend any meetings with representatives of Penn Central and UGP regarding construction over Grand Central Terminal? A. I did.

Q. When did these discussions commence? A. I think my first meeting was in March of 1968, and these meetings continued through until the end of 1969.

Q. Who attended these meetings? A. Aside from members of my own staff and the City Planning Commission, Norman Marcus, Richard Buford, the members of the Penn Central Railroad, real estate division, Sam Hellenbrand, the architects, Mr. Breuer, Mr. Beckhard, Murray Drabkin, representing the developer, Max Siegel, a zoning consultant for the developer.

Q. Did Mr. Saady ever attend any of these meetings, sir? A. Yes.

Q. How many of those meetings did he attend, do you recall? [1268] A. One that I'm sure of, and I know that I met with Mr. Saady on at least two other occasions.

. . .

[1288] Q. Did there come a time during the course of the discussions that representatives of the Railroad in UGP that transferring the developments from Grand Central Terminal to another site was discussed? A. Yes, there did.

Q. When was that discussion had? A. Specifically—the first specific proposal was on September 11th—

Q. And what—

A. —1969.

Q. What sites were discussed? A. The Biltmore site.

[1289] Q. Who was present at the meeting? A. Mr. Saady, Mr. Drabkin, Mr. Hellenbrand, I think Max Siegel, the architect, myself, Mr. Marcus, Mr. Baddell, my deputy. There may have been someone else. That is the best of my recollection.

Q. Did there come a time during the course of that meeting that an agreement was reached in respect to transferring the development rights from Grand Central Terminal to the Biltmore site? A. Yes.

Q. What was that agreement, if you recall? A. The agreement was that we would—we, being the City, would move to—as quickly as possible to get the necessary transfer legislation through the Planning Commission of the

Board of Estimate. The agreement on the part of the developer was that he would move along the lines of developing a transfer of about, as I remember, a million three, a million four, from Grand Central site to the Biltmore site, the Biltmore would be demolished, a new building would be built on the Biltmore site and he would make an application for that building once the legislation was approved. There are a lot of details that we [1290] worked out.

THE COURT: To whom do you attribute that accord? Who particularly said that?

MR. NESPOLE: May we get to that next at this point?

THE COURT: That is what I am interested in knowing.

The witness said the developer agreed. I wonder who spoke for the developer.

Q. Which member of the developer's party indicated this agreement to you? A. Mr. Saady.

Q. And how did he indicate the agreement to you, Mr. Robertson? A. At the end of the meeting we shook hands that each would do his part to bring this to fruition.

Q. And what was the understanding in respect to the obligation of the developer and what was the understanding in respect to the obligation of the City? A. The City was to prepare the necessary transfer legislation—legislation that was subsequently approved. The developer was to develop along the [1291] lines that we discussed during that meeting, a specific proposal which he had brought to that meeting to build a building on the Biltmore site of, roughly 2,100,000 square feet.

THE COURT: What you are telling me by "legislation," you're referring to eventually the amendment of the zoning resolution to incorporate the extension of the transfer of air rights to a so-called adjoining owner?

THE WITNESS: That's correct.

THE COURT: You are speaking specifically of the 1969 amendment?

THE WITNESS: Right.

THE COURT: And on that question is it your position and do you say that that amendment was entirely or mainly the product of these discussions and the agreement to which you've referred?

THE WITNESS: Yes, sir.

Q. Did Mr. Saady tell you at that time that he thought a building on the Biltmore site was not economically feasible?

THE WITNESS: No, he did not.

[1292] Q. Did they operate under any assumption in respect to the feasibility of the Biltmore building? A. Not that I know of. They expressed willingness to put a lot of detailed work into trying to make that viable proposition.

Q. Did there come a time when you saw certain plans proposed by the developer in respect to the Biltmore site?

A. We saw detailed plans over a two-month period of time.

Q. Did there come a time as to whether or not any agreement—withdrawn.

Did there come a time that any agreement was reached in respect to specific proposals about a building on the Biltmore site? A. Yes.

Q. What kind of an agreement was reached and in respect to what proposal, sir? A. Well, the agreements were, roughly, in relation to the open space, the Plaza that is—that would qualify the site for Plaza bonuses where the Plaza would be its size, the kinds and numbers of trees that would be planted in it, the kinds of access that [1293] would be made to the subway and the Grand Central Station concourse, the potential of building a bridge above the street level connecting into Grand Central Station itself. A whole variety of detailed architectural planning questions

was discussed and agreed upon as we went along in these negotiations.

Q. Approximately what period of time are we talking about now, Mr. Robertson? A. Between September and the end of October.

Q. Did Mr. Hellenbrand, whom you have indicated was the representative of the Railroad, ever state that he approved of the agreement to build on the Biltmore site? A. I can't remember whether he ever said that he approved. He certainly negotiated in the vein that would lead us to believe that this was his intention. Yes, we worked pretty hard on those negotiations.

[1294] Q. Was the decision to build on the Biltmore site announced publicly? A. No, it was not.

Q. Why was it not announced publicly? A. It was mutually agreed, at the request of the developer, that it would be inadvisable to talk about tearing down the Biltmore at that time, there were certain union contracts and problems associated with those and they didn't want to alert anyone to the fact that they may be tearing down the Biltmore.

Q. Was that in respect to the union, sir, representing the employees of the Biltmore Hotel? A. That's correct.

Q. During the course of these negotiations, were there any other sites other than the Biltmore discussed? A. As I said earlier, we looked at a variety of sites: the Commodore, the Roosevelt, 466 Lexington, any number of possible sites to which Grand Central square footage could be transferred, yes.

Q. Were you present this morning when Mr. Elliott testified? A. Yes, I was.

. . .

[1312] BY MR. NESPOLE:

Q. Based upon your experience as Director of the Office of Midtown Planning, Mr. Robertson, can you tell us what major American corporations have their headquarters on Madison Avenue?

THE COURT: Wouldn't it be a form of free advertising? We know there are a lot of big corporations there.

A. Union Carbide, IBM, Look, Newsweek.

. . .

[1330] Q. Prior to the passage of the amendment in August, 1969, of Section 74-79, did you or anyone under your direction make any effort to determine if the air rights over the Grand Central Terminal were marketable? A. Yes.

Q. What efforts did you make? A. Dick Buford and I contacted a major real estate developer in New York, to see if he would be interested, theoretically, in that kind of transfer deal.

[1331] Q. Who did you contact? A. Harry Helmsley.

. . .

[1344] THE COURT: Let me interrupt you.

At that stage, you were then to go forward with remedial legislation.

THE WITNESS: Yes, sir.

THE COURT: To possibly accomplish the air rights.

THE WITNESS: Yes.

THE COURT: To have a building on the present site of the Biltmore.

Now, what happened after September of 1969?

THE WITNESS: It was the 11th. That was the first meeting at which the Biltmore was discussed as a real alternative.

THE COURT: What happened?

THE WITNESS: We worked mutually with the Breuer firm and with Mr. Drabkin and Mr. Hellenbrand on details of that specific project, and on our end we refined the legislation, introduced it for public hearing to the Planning Commission in October.

It was approved by the Planning Commission, [1345] if I'm not mistaken, in November, and by the Board of Estimate in December.

At that time, we had expected that there would be an application by the developer to carry out the project on the Biltmore site.

THE COURT: How did you become aware of that?

THE WITNESS: Well, he didn't come in to us with an application.

THE COURT: To what extent did they follow the course of the amendment through the Board of Estimate?

THE WITNESS: They did follow it.

As Chairman Elliott testified this morning, there was no objection at the hearing before the Board of Estimate.

THE COURT: Representatives of the plaintiffs.

THE WITNESS: Yes, and it had been understood, obviously, by us and the owner and his team of consultants that they would of course not object to the hearing before the Board of Estimate, since this was what was going to allow them to move ahead.

. . .

[1409] Q. Mr. Robertson, can you tell us under Zoning Resolution Section 74-79 what total F.A.R. is permitted to be transferred to the Biltmore site from the Grand Central Terminal site? A. I think it's about two million one. That may be inaccurate. I think it's close to that, as I recall it.

Q. If Breuer I or Breuer II were to be constructed on Grand Central Terminal site, would the building—would the railroad be able to utilize the total permissible zoning bulk under the Zoning Resolution on that site? A. They would not.

Q. And why not, sir? A. They could not benefit from plaza bonuses on that site.

[1410] Q. If the Railroad were to proceed on the Biltmore site, could they utilize the total permissible zoning bulk under the Zoning Resolution on that site? A. Provided that they provided the plaza.

Q. Approximately, how much F.A.R. would that equal, sir? A. Well, it is three F.A.R., depending on whatever the total of the site is.

. . .

[1423] Q. Does it refresh your recollection as to whether or not the City had plans in July to go ahead with legislation amending the zoning resolution? A. Yes. I think, as I indicated, we were inclined to move in that direction.

THE COURT: I suppose we can ask now, is the contemplated amendment of this resolution tailored to meet this situation? Is it intended specifically for the Grand Central situation, or was it in contemplation [1424] in respect to additional matters or other matters?

THE WITNESS: The latter.

. . .

THE COURT: I must assume, then, that the amendment to the zoning—I must accept, rather than assume, that the amendment to the zoning resolution was motivated and directed directly towards ameliorating the Grand Central situation.

THE WITNESS: We had been moving, during this entire time, with all of our zoning resolutions, towards policies which would give us more flexibility in dealing with this kind of situation specifically.

THE COURT: The Grand Central situation [1430] brought it to a head.

THE WITNESS: It brought it to a head.

THE COURT: Doesn't that dispose of that, Mr. Stewart?

MR. STEWART: I think so, your Honor.

I have one question.

BY MR. STEWART:

Q. Would the legislation have come into being if there hadn't been any Grand Central situation? A. I don't know.

• • •

[1440] Q. Mr. Von Ancken, what is your occupation? A. I'm a real estate appraiser with the firm of William A. White and Sons, where I'm vice-president of the company and in charge of the real estate appraisal department.

• • •

[1462] Q. What in your opinion is the rent that Penn Central could get by leasing the development rights over Grand Central Terminal to other sites eligible [1463] under Section 74-79 of the Zoning Resolution to receive such rights? A. The rent that I think that is a fair and just rent is \$1.70 a square foot. However, in this analysis I have not used the \$1.70 a square foot. I have applied a discount factor of 15 per cent to that \$1.70 and came up with an estimated rental value for the air rights of \$1.45 a square foot.

Now, the discount factor was applied in order to stimulate interest, immediate interest in the purchasing or leasing of the air rights. There is also another basis for the discount factor, and that is an analysis of the extra profit that is generated by an individual who would lease one, or one million or two million square feet of development rights. There is a certain inherent profit that the individual generates from leasing an extra square foot of office space.

Let me give you an example.

In the Biltmore site you can presently build on the site a building of approximately 800,000 square feet without any air rights. If you purchased 1.2 million square feet of air rights or leased them, [1464] you would have a building comparable to what was proposed by Breuer of 2,150,000 square foot net. The rent that you could get for this build-

ing in the market place, I will estimate at \$10.50 a square foot.

Now we can work this on a per square foot basis and work backwards and find out what is left over to pay for the air. Mainly, you have operating taxes—operating costs and taxes, which would come to approximately \$3.70 in today's market, you have a construction cost for the building of, say, \$45 a square foot, which is higher than what is indicated in the report, but for rounding purposes we'll use the highest figure, and your constant mortgage rate would be 9.5 per cent, which would equal a payment for the mortgage and for the construction of the building of \$4.27 a square foot.

Adding those two figures together you come up with the \$8 a square foot of rent that's required to make the building pay for itself.

Now, over and above \$8 you have two factors. You have profit and payment for air rights. If you estimate your profit at 10 per cent of the total [1465] package, that leaves you—that would be \$1 approximately, and it leaves you with \$1.50 a square foot as payment for the air rights.

Q. In other words, Mr. Van Ancken, your analysis proceeds on the assumption that the air rights used on another site generates additional income on that site; is that correct? A. That's correct.

Going back to the Biltmore site it would generate on the Biltmore site approximately \$1,200,000 additional income that they wouldn't get from developing an 800,000 square foot building.

Q. So that the value, the market value you placed on the development rights through the transfer is directly correlated to the amount of income that that would generate plus the cost involved in generating that income; is that correct? A. That's correct.

• • •

[1532] THE COURT: Yes. I say, well, here you have the owner of the air rights saying, I have a chance—the owner of Grand Central is saying to you, as a broker, or as an expert in the field, as an appraiser—I have the chance here to use my air rights on my Biltmore property by demolishing the Biltmore Hotel and substituting it with a multi-story skyscraper.

You've considered all of the respective factors. What would you advise him? Go ahead.

THE WITNESS: I would say, go ahead, with one qualification. Only lease approximately half of the air rights available over the Terminal and let the Terminal have the balance to rent to other sites; because in my estimation, it wouldn't make any sense to build a 3,000,000 square foot building—I think the optimum is 2,000,000 square foot building over the Biltmore.

[1574] Q. Can you compare the Biltmore site to the Grand Central Terminal site in terms of, say, the flexibility regarding the plazas, arcades, setbacks, building shape, placement of stores, for us? A. Yes. Well, under the Breuer I—no I changed that. The lease to UGP Properties, Inc. limits the type of development that could be placed over the Terminal. This limitation is not—would be placed on the Biltmore site. You could place the building in any area of the plot; you could have your stores facing on four sides, you could have ingress traffic for pedestrian ingress from four sides, which you could not have on the Terminal site.

You would have four views, when the Terminal site—you are actually restricted to three views, two [1575] narrow views and one view looking south.

The northerly view would be greatly blocked by the Pan Am Building, which would be only 250 feet away. You have more flexibility in allowing for your plazas, the placement of the plazas, the lobby space, the entrance space, where it is to be placed on the plot.

Q. In terms of the streets surrounding each site, namely the Biltmore site and the Grand Central Terminal site, as a real estate appraiser how would you evaluate these adjacent streets as to their respective prestige factors? A. Well, Vanderbilt Avenue is similar for both sides. Madison Avenue is far superior to 42nd Street.

Q. 42nd Street would be the southernmost street on the Grand Central Terminal site building, would it not? A. Yes, it would be. It would be the place where people enter into the building.

[1578] Q. What is the address that Mr. Breuer lists for the Biltmore site building? A. 333 Madison Avenue.

[1579] Q. Is Madison Avenue as prestigious a street, or more prestigious than 42nd Street? A. My answer is it's far more prestigious, more distinguished, has better quality than 42nd Street.

Q. What is the basis for that opinion, Mr. Von Ancken? A. Madison Avenue has major corporations located along—such as the IBM, Union Carbide, Newsweek, Look, Occidental Petroleum, Carrier Corporation, Johns-Manville, Sperry-Hutchison, Litton Industries, Associated Transport.

And then it has the major advertising companies, such as Batten, Barton. Durstine & Osborne and Young & Rubicam.

[1580] It has a better quality of tenancy.

The stores are of high quality.

The rents are higher than the rents that they receive on 42nd Street.

[1582] Can you compare the view from a building on the [1583] Biltmore site, as contrasted to a building on top of Grand Central Terminal? A. Yes. The view on the Biltmore site would be superior. You'd have a four-way view

as opposed to a three-way view in Breuer I and Breuer II Revised. The northerly view of Breuer I and Breuer II Revised would be facing the Pan Am Building. The Breuer buildings would be just as wide as the Pan Am Building and would look directly at it. It would be a rectangular building and a large portion of the rectangle would be facing the Pan Am Building; but the Hotel Biltmore would be more of a square shape building, where you have more utilization of the floor space and better views in comparison to the shape.

Q. Mr. Von Ancken, there's been testimony in this case that the rectangular shape of the building to be built on top of Grand Central Terminal was preferable to the square building that would be built on the Biltmore site.

Do you agree or do you disagree with that opinion, and why? A. I disagree with that opinion. The square shape site has an equal access to the central elevator bank, whereas [1584] the rectangular shape—normally, the elevators are placed at the center, they're a long distance away from the outer wall on the small sides of the rectangle. Also, in this particular case, it's a view factor. They have a broad wall, over 300 feet long, that faces the broad wall of the Pan Am Building.

Q. Did the building on top of Grand Central Terminal provide for any plazas and other open space? A. No, there was no provision for plazas.

Q. Did the Biltmore site plans, introduced here by the plaintiff, provide for any plazas or open space? A. Yes, there was a plaza off Madison Avenue.

Q. Is there any advantage in terms of rentability of a building to have plazas and open spaces? A. Yes.

Q. What is that advantage? A. Well, it gives a more open effect to the building. It enhances the entranceway into the building and the lobby appearance of the building.

Q. Does it bear any relationship to the extent of commercial space that's available? A. Well, sometimes it does.

You could do what they did for the General Motors Building on Fifth Avenue and 59th

• • •

[1635] Q. Shouldn't the expense of removing rubbish from the track area which might create a fire hazard properly be included as one of the expense items in your chart on pages 12 and 13? A. Absolutely not. It's a Railroad expense item. It's necessary for the Railroad to remove the trash to avoid injury to the passengers, which might be near the tracks or on the platform. It's the Railroad's absolute necessity to clean their own tracks in order that any cars that may be on the tracks might not burn up if trash caught on fire located underneath the cars, or if an engine exploded underneath the Terminal, due to a piece of trash catching on fire. It's the Railroad's duty to remove that in order to cut down on their own insurance [1636] premiums.

Q. You're saying, I take it, then, that you disagree with Mr. Milano that the Railroad had any duty to remove such trash to the extent that it might create a fire hazard for the Terminal as a whole?

MR. NESPOLE: Objection, Judge. It's not what he's saying. He's saying they had to remove the trash in order to make the trains run safely.

MR. STEWART: All I am suggesting, your Honor, is that there are two reasons for removing the trash: One, the operation of the railroad cars; and the other, the operation of the building.

I will pass on to the next question.

• • •

[1664] Q. I will accept that. Now, if in 1971 the air rights, or a portion of the air rights over Grand Central Terminal had been transferred to those three sites, and if they were developed or redeveloped, wouldn't the Railroad have lost that two million five hundred thousand dollars of revenue,

of cash flow? A. Absolutely not, because you would have a basic payment for the hotels themselves and you would have an excess payment of the three million, four hundred thousand dollars that I've indicated for the air rights.

For instance, there was an offer made for these hotels, say fifteen million dollars a piece. Now, the fifteen million dollars a piece totals forty-five million dollars. If you were to rent these hotels for land purposes under a long term lease, an individual might be willing to accept a nine percent return under a land lease for these hotels, so that would be nine percent of [1665] forty-five million dollars or four million, five hundred thousand dollars that the Railroad would get just by leasing these hotels, just as hotels, based on their offer.

Q. You're assuming, I take it, that the Railroad would require an amount in the ground lease of these hotels which would reflect, among other things, the income lost. Is that what you're saying? A. No, I'm saying that—if we deal with the Hotel Biltmore, it currently derives an income of cash flow income of \$450,000 a year. If there was an offer made for the Hotel Biltmore of \$15 million, \$15 million as a sale, and we can interpolate that sale into a lease price, just using nine percent on \$15 million, as a fair return under a net lease, and that would indicate a return per year for the hotel of a million, three hundred fifty thousand dollars, just for the hotel, with the eight hundred thousand square feet of air over the hotel as compared to \$450,000 that is currently generated, which is about \$900,000 difference.

. . .

[1675] THE COURT: Do you know of any active interest in the acquisition of these air rights on the part of developers or brokers or both?

. . .

[1676] Q. You say you have heard of interest in air rights?

. . .

THE WITNESS: I know that there are people who are bidding on the hotels who are also interested in using the air rights.

I know that the owners of the—

THE COURT: Give us names and details.

THE WITNESS: I can tell you of one specific case. The owner of the East Side Airlines Terminal Building, which is a 20,000 square foot plot located on 42nd Street and Park Avenue, it's a four-story building, the owner is Goldman-DiLorenzo. Those people would be very interested in renting the air rights over the Terminal.

THE COURT: Who told you that?

THE WITNESS: The person who told me that was Louis "Madback," president of our company, who in turn talked to Goldman-DiLorenzo, [1677] to Sol Goldman, about air rights over the Terminal.

THE COURT: How long ago?

THE WITNESS: This was about a month ago.

THE COURT: Has anything been done to try to arrive at a deal?

THE WITNESS: No because that is the biggest stumbling block, because we as brokers cannot represent Penn Central when there's a case still pending and they don't know whether these air rights would still be available or not.

THE COURT: That's been a deterrent to this firm, you say? They could go out and get another broker, couldn't they?

THE WITNESS: No, it would be a deterrent to any broker because the broker would have to get clearance from Penn Central to represent Penn Central in their negotiations.

. . .

[1680] Q. How long would it take, in your opinion, to transfer all of the air rights to other locations to which they can be transferred? [1681] A. I would estimate approximately two to three years.

THE COURT: I don't quite get that. Is your question, how long would it take—and I add: to effect a transfer?

The witness says two or three years.

MR. STEWART: Let me ask another question, your Honor.

Q. How long would it take to consummate agreements with respect to the transfer of all of these air rights to lessees or purchasers, and is your answer still the same?

A. The initial bulk of the air rights would be immediately, but the disposition of the last 500,000 or 800,000 square feet would be over a period of two to three years.

Q. What do you mean by the "initial bulk"? A. The bulk that's required to build on one of the hotel sites, approximately a million—

• • •

[1732] Q. Would you turn to page 29 of your report, please?

What is the purpose of this comparison? A. The purpose of the entire comparison is to indicate what the—what the net rent would be if Breuer I or Breuer II was constructed in order for the building to have a profit and in order for the building to break even.

Q. And why is the Biltmore included? A. The Biltmore is included on the schedule to indicate that if the Biltmore building was built today the rent per square foot would be less than what was the proposed rent for Breuer I and II in late 1968.

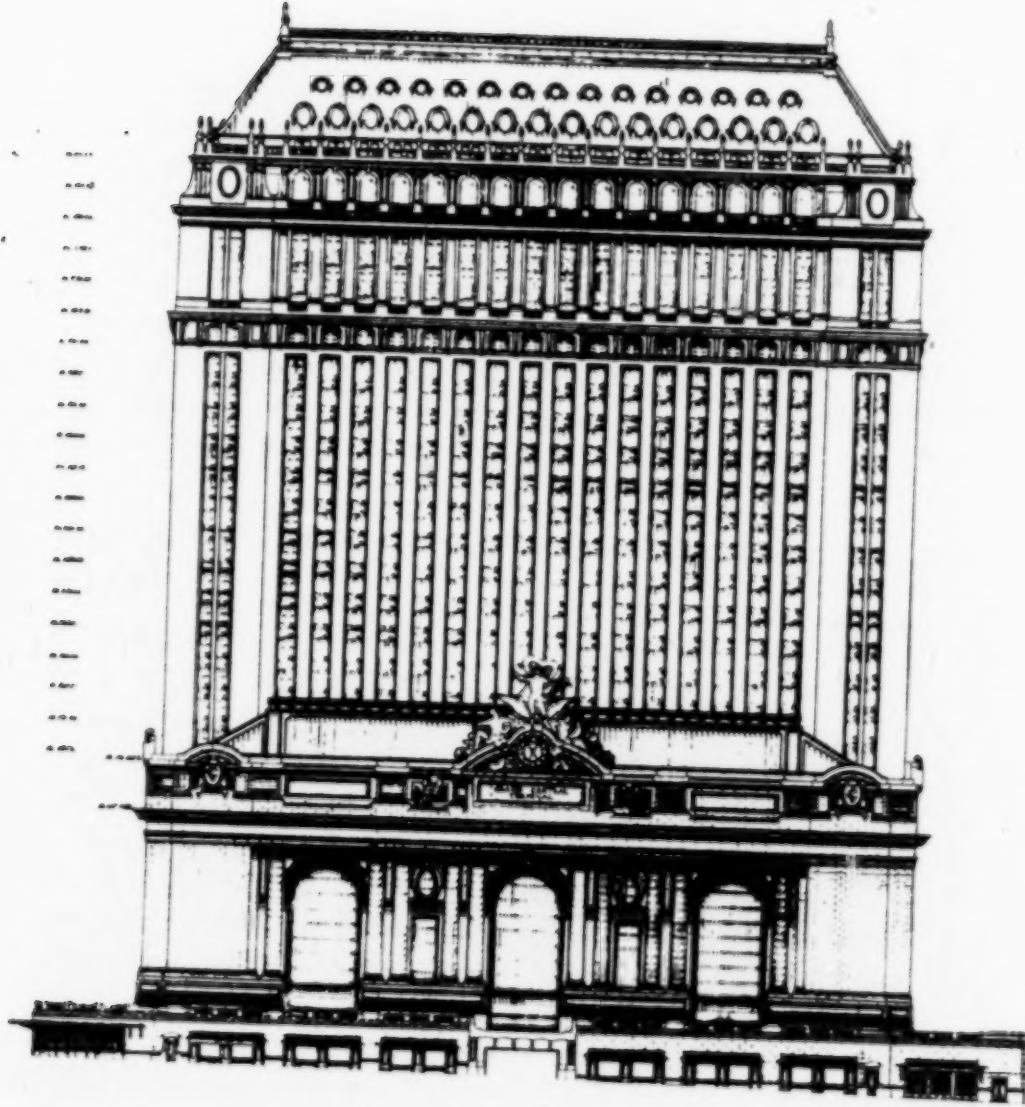
Q. Are you suggesting by this analysis that it would not have been possible to construct the building at an economically feasible cost in the middle of 1968?

THE COURT: Do you mean the Biltmore?

MR. STEWART: No, sir. I meant to say on top of the Grand Central Terminal.

THE WITNESS: I am saying it would cost far more to build the building over the Terminal, [1733] over the southerly section of the Terminal, than it would cost to build a normal office building.

• • •



## Exhibit 8

ASSESSED VALUATION AND RATES FOR TAX BLOCK 1280 Lot 1  
AND GRAND CENTRAL TERMINAL BUILDING

	1967-68	1968-69	1969-70	1970-71	1971-72	1972-73
Non-Transportation Part (Taxable)						
Land	\$2,530,000	\$4,270,000	\$4,500,000	\$7,200,000	\$7,900,000	\$8,900,000
Building	1,780,000	1,540,000	1,540,000	2,500,000	2,500,000	2,700,000
TOTAL	\$4,310,000	\$5,810,000	\$6,040,000	\$9,700,000	\$10,400,000	\$11,600,000
Transportation Part (Tax Exempt)						
Land	\$14,320,000	\$14,280,000	\$15,050,000	\$14,600,000	\$16,000,000	\$16,100,000
Building	5,525,000	5,765,000	5,765,000	5,760,000	5,753,000	5,730,000
TOTAL	\$19,845,000	\$20,045,000	\$20,815,000	\$20,360,000	\$21,753,000	\$21,830,000
Tax Rate	.05110	.05244	.05540	.05906	.06001	.06500*
Tax on Non-Transportation Part						
Land	\$ 129,283	\$ 223,919	\$ 249,300	\$ 425,232	\$ 474,079	\$ 578,500
Building	90,958	80,758	85,316	147,650	150,025	175,500
* Estimated						

## Exhibit 9

NET TRANSFERABLE ZONING FLOOR AREA  
FROM  
GRAND CENTRAL TERMINAL PARCEL A

Area of Grand Central Terminal Lot:	134,202 sq. ft.
Maximum Permitted Zoning Floor Area as of Right (Lot Area $\times$ Floor Area Ratio of 15):	2,013,030 sq. ft.
Bonus Areas:	402,606 sq. ft.
Total Zoning Floor Area with Bonuses (Lot Area $\times$ Floor Area Ratio of 18):	2,415,636 sq. ft.
Existing Zoning Floor Area:	264,642 sq. ft.
Net Transferable Zoning Floor Area:	2,150,994 sq. ft.

## Exhibit 10—Diagram of Portion of Manhattan Island



## Exhibit 11

PROPERTY POSSESSED BY PENN CENTRAL TRANSPORTATION  
COMPANY IN GRAND CENTRAL TERMINAL AREA SUBJECT TO  
LONG-TERM GROUND LEASES AND CONTRACTS OF SALE

## PROPERTY SUBJECT TO LONG-TERM GROUND LEASES

<u>Property</u>	<u>Lot Area (Sq. Ft.)</u>	<u>Description</u>
51 East 42nd Street	10,251	17-story office building
Yale Club	9,105	22-story club
Pan Am Building	150,701	59-story office building
Lexington-43rd Street Driveway Area	9,000	Parking lot
Graybar Building	68,303	29-story office building
383-5 Madison Avenue	43,313	13-story office building
250 Park Avenue	24,970	20-story office building
270 Park Avenue	80,332	52-story office building
320 Park Avenue	16,600	Portion of 33-story office building
277 Park Avenue	81,337	50-story office building

<u>Ground Tenant</u>	<u>Lease Expiration Date (Subject to Renewals)</u>	<u>Renewals</u>
51 East 42nd Street Corporation	Jan. 31, 1987	None
The Yale Club of New York City	Sept. 30, 1997	None
Grand Central Building, Inc.	Apr. 30, 1997	Two 21-year renewal terms
Lexington-43rd, Inc.	May 31, 1976	One 11-year, 7-month renewal term and two 21-year re- newal terms
Metropolitan Life Insurance Company	May 31, 1976	One 11-year, 7-month renewal term and two 21-year re- newal terms
The Manhattan Savings Bank	Apr. 30, 1987	None
250 Park Avenue Corporation	Mar. 31, 1987	Two 21-year renewal terms
Union Carbide Corporation	Dec. 31, 1975	Two 21-year renewal terms
Uris 320 Park Corporation	Dec. 31, 1990	Two 21-year renewal terms
Stahl Equities Corporation	June 30, 1991	Two 21-year renewal terms

\* Subject to Landlord's right to refuse second renewal term on paying the then value of building.

\*\* Subject to Landlord's right to terminate as of March 31, 2018 upon payment of the then value of building.

## Exhibit 11

<u>Property</u>	<u>Lot Area (Sq. Ft.)</u>	<u>Description</u>
299 Park Avenue	40,166	42-story office building
Waldorf-Astoria Hotel	81,337	44-story hotel

PROPERTY SUBJECT TO CONTRACTS OF SALE AND LONG-TERM  
GROUND LEASES

280 Park Avenue West Building	12,000	16-story office building
280 Park Avenue East Building	24,970	30-story office building
350 Park Avenue	15,062	Portion of 30-story office building
230 Park Avenue	69,154	34-story office building
245 Park Avenue	81,337	47-story office building

## PROPERTY SUBJECT TO CONTRACT OF SALE ONLY

52 Vanderbilt Avenue	9,105	20-story office building
----------------------	-------	--------------------------

<u>Ground Tenant</u>	<u>Lease Expiration Date (Subject to Renewals)</u>	<u>Renewals</u>
Fisher-Park Lane Company	Oct. 1, 2015	One 25-year renewal term
Hotel Waldorf- Astoria Corpo- ration	Nov. 30, 1977	One 21-year renewal term
Sigmund Sommer	Jan. 1, 2018	One 25-year renewal term
Rose Associates	Nov. 30, 2006	One 21-year renewal term †
Manufacturers Hanover Trust Company	Dec. 31, 1990	Two 21-year renewal terms
The New York Bank for Savings	Oct. 14, 1983	One 25-year renewal term
Uris 245 Park Corporation	May 14, 2002	Two 30-year renewal terms

\*\*\* Subject to Landlord's right to terminate as of September 30, 2035 for \$1,000.

\*\*\*\* Subject to Landlord's right to refuse renewal term on payment of "sound value" of building.

† Subject to Landlord's right to refuse to renew on payment of the then value of building.

†† Subject to Landlord's right to refuse second renewal term on payment of the then value of building.

††† Subject to Landlord's right to terminate as of May 14, 2032 upon paying the then value of building.

## Exhibit 12

CASH FLOW FROM BARCLAY, BILTMORE, COMMODORE AND  
ROOSEVELT HOTELS (1965-1971)  
(in dollars)

## The Barclay Hotel

	1965	1966
Net Operating Income	1,710,817	1,835,205
Capital Replacements	241,226	616,480
Cash Flow	1,469,591	1,218,725

## The Biltmore Hotel

	1965	1966
Net Operating Income	1,767,851	1,640,464
Capital Replacements	200,636	303,954
Cash Flow	1,567,215	1,336,510

## The Commodore Hotel

	1965	1966
Net Operating Income	1,545,612	812,154
Capital Replacements	114,317	32,011
Cash Flow	1,431,295	780,143

## The Roosevelt Hotel

	1965	1966
Net Operating Income	1,534,702	1,339,241
Capital Replacements	768,896	631,189
Cash Flow	765,806	708,052

1967	1968	1969	1970	1971
2,276,193	2,614,394	3,228,424	2,956,526	2,025,446
577,594	437,883	602,180	466,937	74,996
1,698,599	2,176,511	2,626,244	1,489,589	1,950,450

1967	1968	1969	1970	1971
1,846,969	2,113,841	2,183,272	1,352,193	580,296
300,739	577,404	639,711	193,063	129,824
1,546,230	1,536,437	1,543,561	1,159,130	450,472

1967	1968	1969	1970	1971
1,350,110	1,338,050	1,790,175	1,012,233	(263,746)
545,900	1,018,428	1,611,639	1,379,946	652,311
2,154,323	319,622	178,536	(367,713)	(916,057)

1967	1968	1969	1970	1971
7,774,488	1,963,251	1,953,613	1,469,460	564,294
519,099	564,841	483,510	370,830	433,645
1,255,389	1,398,410	1,470,103	1,098,630	130,649

## Exhibit 35 A

NOTES RELATING TO GRAND CENTRAL TERMINAL  
STATEMENT OF REVENUES AND COSTS—YEAR 1969

- (A) The following equivalent positions are included in the Operation of the Terminal:

Station Master and Staff	17
Information Clerks	9
Gate Ushers	12
Elevator Operators	5
Maids and Matrons	4
	<u>47</u>

- (B) Materials and Supplies includes those used in maintenance \$75,154. and cleaning \$23,254. of the Terminal.
- (C) Analysis of Cost of Steam, Electricity and Water purchased less credit for sales and consumption by tenants and other users in Grand Central Terminal.

## YEAR 1969

	Steam	Electricity	Total
Gross Cost	\$1,262,447	\$1,143,831	\$2,406,278
Deduct sales and consumption by others	875,255	1,094,989	1,970,244
	<u>387,192</u>	<u>48,842</u>	<u>436,034</u>
Deduct additional sales of brine, air conditioning etc. not included above			65,656
Water & Sewer	\$223,443		
Less Sales	53,218		170,225
NET UTILITIES			<u>\$ 540,603</u>

- (D) Other Direct Costs includes the following items:

Rubbish Removal	\$ 45,648
Other General Expenses	8,285
	<u>\$ 53,933</u>

- (E) Supervision: Departmental Overhead Costs as follows:

Maintenance, Repairs and Building Service	\$ 19,904
Cleaning	30,230
Terminal Operation	30,448
Policing	53,193
Track Cleaning	5,122
	<u>\$ 138,897</u>

- (F) Amounts billed to tenants represent the following items:

Recoverable Cost of Maintenance for the Account of Concessionaires and others	\$ 86,443
Recoverable Cost of Policing a Joint Passageway	14,470
Recoverable Cost of Cleaning a Joint Passageway	12,307
	<u>\$ 113,220</u>

## Exhibit 35 B

GRAND CENTRAL TERMINAL  
STATEMENT OF REVENUES AND COSTS  
YEAR 1971

Rents and Concession Revenues		\$3,174,257
Costs of Maintenance and Operation		
<i>Labor:</i>		
Maintenance, Repairs and Service Plant Operation		\$1,141,679
Cleaning Terminal Operation	(A)	600,392
Policing		438,566
Track Cleaning		57,188
Total		\$2,870,578
<i>Other Costs:</i>		
Material and Supplies	(B)	69,692
Utilities	(C)	660,710
Other Direct Costs	(D)	69,485
Real Estate Taxes		598,494
Gross Earnings Taxes		135,000
Depreciation		264,500
Insurance		18,990
Total		1,816,871
<i>Overheads:</i>		
Supervision	(E)	205,029
General Administrative Expenses		350,301
Total		555,330
Deduct amounts billed to tenants	(F)	166,055 CR.
Net Cost of Maintenance and Operation		5,076,724
NET DEFICIT		<u>\$1,902,467</u>

## EXHIBIT 35 B

NOTES RELATING TO GRAND CENTRAL TERMINAL  
STATEMENT OF REVENUES AND COSTS—YEAR 1971

- (A) The following equivalent positions are included in the Operation of the Terminal:
- |                          |           |
|--------------------------|-----------|
| Station Master and Staff | 17        |
| Information Clerks       | 9         |
| Gate Ushers              | 12        |
| Elevator Operators       | 5         |
| Maids and Matrons        | 4         |
|                          | <u>47</u> |
- (B) Materials and Supplies includes those used in maintenance \$51,657. and cleaning \$15,761. of the Terminal.
- (C) Analysis of Cost of Steam, Electricity and Water purchased less credit for sales and consumption by tenants and other users in Grand Central Terminal.

## YEAR 1971

	Steam	Electricity	Total
Gross Cost	\$1,530,170	\$1,327,434	\$2,857,604
Deduct sales and consumption by others	<u>1,060,881</u>	<u>1,270,746</u>	<u>2,331,627</u>
	469,289	56,688	525,977
Deduct additional sales of brine, air conditioning etc. not included above			72,800
Water & Sewer	\$272,425		
Less Sales	<u>64,892</u>		<u>207,533</u>
NET UTILITIES			<u>\$ 660,710</u>
(D) Other Direct Costs include the following items:			
Rubbish Removal		\$	46,008
Other General Expenses			23,477
		\$	<u>69,485</u>

## (E) Supervision: Departmental Overhead Costs as follows:

Maintenance, Repairs & Building Service	\$ 22,605
Cleaning	43,090
Terminal Operation	40,887
Policing	92,631
Track Cleaning	5,816
	<u>\$ 205,029</u>

## (F) Amounts billed tenants represent the following items:

Credits for Policing Off Track Betting Location and Joint Passageway	\$ 89,320
Recoverable Cost of Maintenance for the Account of Concessionaires and others	57,771
Recoverable Cost of Cleaning a Joint Passageway	18,964
	<u>\$ 166,055</u>

## Exhibit 36

DEFERRED MAINTENANCE COSTS FOR GRAND CENTRAL TERMINAL  
I. DEFERRED STRUCTURAL MAINTENANCE

	Estimated Cost
Renewal of roof over Main Concourse, Main Waiting Room and North Balcony in kind including drainage, copper ridge roll, eave flashing and gable flashing	
1. Removal of skylights on fourth floor roof and substituting roofing	\$ 20,000
2. Replacing copper roofing on remainder of roof	283,800
3. Renewal of roof drainage system	<u>22,500</u> \$326,300
Point up brickwork on outside of seventh floor parapet wall adjacent to and south of cooling towers	1,500
Point up joints in granite work as necessary from street level to overhead roadway level on 42nd Street from Commodore Hotel to Vanderbilt Avenue and on Vanderbilt Avenue from 42nd Street to Pan Am Building line	4,000
Repair of stone and terra cotta balustrade along 42nd Street from Commodore Hotel to Vanderbilt Avenue	3,000
Repair, clean, red lead and paint the steel wainscoting on the northeast portion of the northbound overhead roadway over 45th Street, also renew 700 feet of sidewalk on 42nd Street east of Vanderbilt Avenue	6,500
Repair various leaks along overhead roadway up to 46th Street, including new leaders, new drains, new track pans, etc.	5,000
Renewal of expansion joints along overhead roadway up to 46th Street	20,000
Total	<u>\$366,300</u>

## Exhibit 36

## II. DEFERRED OPERATING MAINTENANCE

	Estimated Cost
Paint ceilings, walls and piping in refrigeration plant, heating and water supply plan and various operating shops	\$ 26,000
Renovation of refrigeration plant and heating and water supply plant	
1. Refrigeration plant	\$105,000
2. Heating and water supply plant	<u>100,000</u> 205,000
Emergency lighting system (required by City law by July 1, 1972)	<u>141,200</u>
	<u><u>\$372,200</u></u>

## Exhibit 36

## III. DEFERRED NONOPERATING AND NONSTRUCTURAL MAINTENANCE

	Estimated Cost
Steam clean elevations from overhead roadway up to roof parapet, south, east and west side of Terminal	\$ 75,075
Chemically clean the interior Caenstone in the Terminal	37,600
Paint and redecorate the barrel vaulted ceiling in the Main Concourse including the plaster ornamentation	
1. Restoration of ornamental plaster	\$ 45,600
2. Painting of arched ceiling	
Scaffolding	179,000
Artwork	115,000
Company force work	<u>87,360</u> 426,960
Total	<u><u>\$539,635</u></u>

Deferred Structural Maintenance \$ 366,300

Deferred Operating Maintenance 372,200

Deferred Nonoperating and  
Nonstructural Maintenance 539,635Total Estimated Cost \$1,278,135

Exhibit C,  
Photo of Grand Central Terminal



Exhibit D 1. Photo  
of Grand Central Terminal

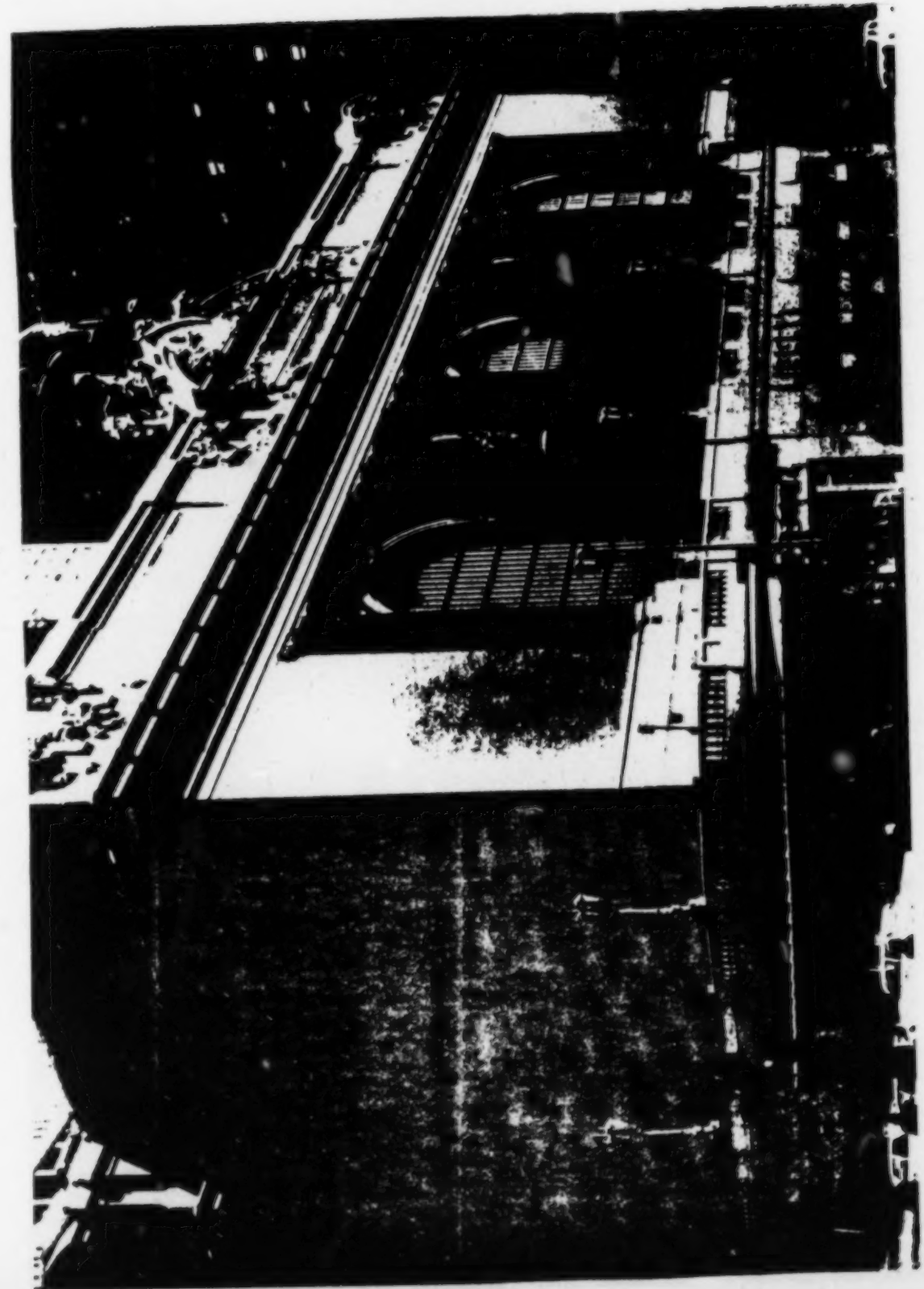
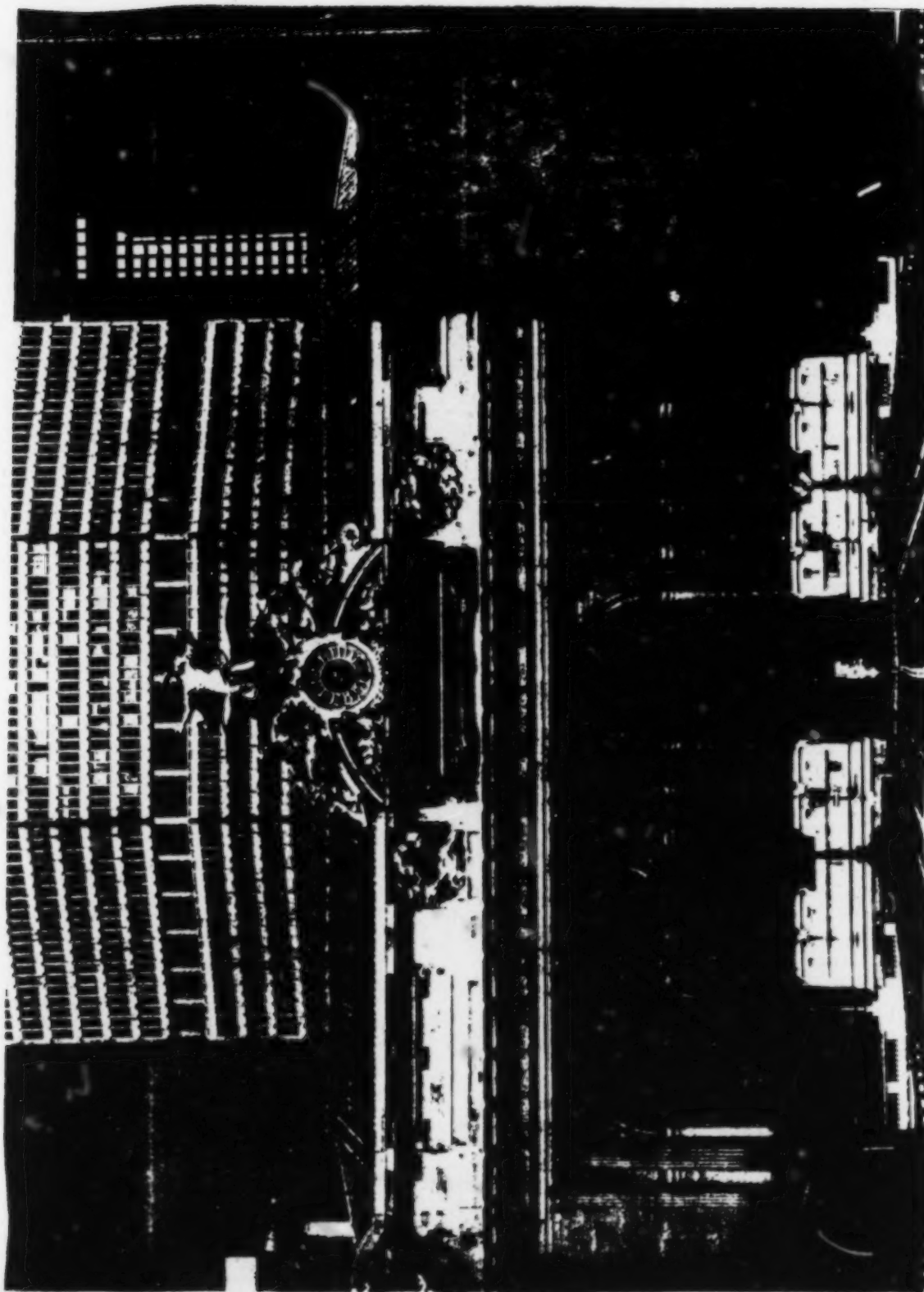


Exhibit D 4. Photo  
of Grand Central Terminal



Appraisal Report & Analysis  
Grand Central Terminal

Exhibit V

WM. A. WHITE & SONS

ESTABLISHED 1868

REAL ESTATE

51 East 42nd Street • New York, N. Y. 10017

Telephone: 682-2300

May 22, 1972

James Nespole, Esq.  
Assistant Corporation Counsel  
Municipal Building  
New York City, N.Y.

Dear Sir:

Pursuant to your request, we have prepared an appraisal and Highest & Best Use Study of the property known as Grand Central Terminal, located in the City and State of New York.

We have considered the proposals known as Breuer I and Breuer II Revised, dated August, 1968 and July, 1969.

We have considered the lease that is now in effect between the 51st Street Realty Corporation, hereafter known as Penn Central and U. G. P. Properties, Inc. dated January 22, 1968.

We have considered the office market in midtown from 1968 through 1972. We have considered rental rates of new office buildings and mortgage interest rates over the same 4-year period.

We have considered an alternative plan which provides more income to Penn Central than Breuer Plans I or II Revised, while at the same time, not defacing any part of the Terminal Building.

We have analyzed the proposals of Breuer I and II Revised and find that the construction of the proposed office tower would not provide any net income to the developer, U.G.P. Properties, Inc.

We find that there is an abundance of vacant new office space in the Grand Central area. We find that rents in new office buildings are below the rental rate which is necessary to make the development over the Grand Central Terminal a profitable business venture.

Specifically, we find that the alternative approach considered in the body of the attached report provides \$800,000 more in net income to Penn Central than the net rental under Breuer Plans I or II Revised.

There are various ancillary benefits created by the preservation of the Terminal building which accrue to those buildings that surround it. The light, view and air over the Terminal will be preserved. The southerly views from the Pan Am Building will also be preserved.

Attached hereto is a report indicating our findings.

Very truly yours,

/s/ ROBERT VON ANCKEN  
Robert Von Ancken,  
Senior Realty Appraiser  
Vice President

RVA:eg  
Encl.

## Exhibit V

### Alternative Use of Development Rights

In 1971 the Terminal earned \$1,045,000 net income from those commercial uses located within that area of the Terminal that would be demolished or lost under Plan I and Revised Plan II. This income would be lost to Penn Central, the landlord, with the implementation of the Breuer proposals. Subtracting the rent loss of \$1,045,000 from the projected net rent for the development space of \$3.6 million reduces the true net income to the Terminal under Breuer Plan I and Reviser Plan II to \$2,555,000.

Further, a considerable portion of the upper floor space on the first through third floors on the southwesterly office bank is now occupied by Penn Central and related railroad uses for which no rent is being collected. The railroad would have to rent alternative facilities and thus further reduce their actual net income through the present leasing plan with U.G.P. Properties, Inc. The estimated rental value for this space is \$33,600 (\$4. per sq. ft.). Further, the Breuer plans do not substantially reduce the operating cost of the Terminal for railroad and commercial uses. The present lease for Breuer I and II Revised is \$1.68 and \$1.72 per square foot of gross zoning area. The rent is about 20% less than the average because of the extra foundation problems and costs borne by the lessee.

There are 2,353,400 square feet of development rights over the Terminal that could be put in an "air bank" and transferred to those owners adjoining the Terminal through a common chain of ownership (See Zoning section for further data). Various blocks of air space could be rented or sold to adjoining sites at a rate that would induce those interested parties to participate. The projected rent for the available development rights is \$1.45 per square foot of permitted zoning building bulk, 15% less than the average gross economic rent per square foot of zoning area for

Breuer I and II Revised of \$1.70 per square foot. \$1.45 per square foot  $\times$  2,353,400 square feet available for transfer = \$3,412,486 rounded to \$3,400,000.

This 15% reduced rental on top of an originally low economic rent would unquestionably be sufficient inducement to adjoining property owners to rent or buy the development rights over the Terminal and use it for their own office sites. This does not include any payment that the Pan Am Building might pay for protection of their southerly exposure.

Further, the rental value of the proposed nearby structure would be enhanced because the present vistas and open air over the Terminal would remain.

Under Breuer Plan I and II Revised, Penn Central is actually adversely affecting the vistas and air of the adjoining properties that are under their ownership and available for purchase.

Nearby building sites would have the advantage of greater light, view and air provided by the air mass above the Terminal. Thus rental rates in proposed nearby office buildings would be enhanced and should provide some of the necessary inducement for adjoining property owners to lease or buy from the Terminal "air bank".

The Terminal would lose \$1,455,000 in 1971 of gross income that it currently derives from renting the space in the southerly part of the Terminal, the theater and the parking lot at 43rd Street. This space would have to be demolished for a new office tower and the parking lot would be used for truck loading and a one-story structure.

The income derived from the rental of the unused development rights plus the savings by retaining all Terminal rent income is substantially greater than the rent to be paid by the proposed tenant, U.G.P. Properties, Inc.

The income from the various commercial uses could be enhanced by allowing additional booths and perhaps converting the space 20' above the waiting rooms into office, store or recreational facilities. Many of the booths and stores are sublet at substantially higher rents. These leases will eventually come due and the Terminal owners could then charge the higher sublease rents.

The combination of the savings to Penn Central by keeping the present income to the Terminal intact (\$1,045,000 of net income lost under Plan I and Revised Plan II) and the money received from renting the development rights in the "air bank" over the Terminal, \$3,400,000, more than offsets the rent loss of \$3.6 million sustained by negating the existing lease to U.G.P. Properties Inc.

The rent loss sustained by Penn Central under Breuer Plan I and Revised Plan II as compared to the suggested alternative plan is: 2,353,440 sq. ft. gross @ \$1.45 per sq. ft. = \$3,400,000

Estimated Net Rental Value of development space under existing lease to U.G.P. Properties, Inc.	\$3,600,000
Less loss of net income from southerly section of terminal	\$1,045,000
Net to Terminal under Breuer Plans	<u>\$2,555,000</u>
Difference	\$ 845,000

Alternative Plan provides \$845,000 more income to Penn Central on an annual basis than the lease to U.G.P. Properties, Inc.

Supreme Court, City of New York  
FILED

NOV 16 1977

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

Michael R. Sak, Jr., Clerk

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Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY,  
THE NEW YORK AND HARLEM RAILROAD  
COMPANY, THE 51ST STREET REALTY  
CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

On Appeal from the Court of Appeals  
of the State of New York.

---

MOTION TO DISMISS

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IN THE  
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Appellees.

---

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of  
this Court, the appellees moves to dismiss  
the appeal herein on the ground that it  
does not present a substantial federal  
question.

QUESTION PRESENTED

Where a municipal building regulation  
is challenged on economic grounds, but it

is not established that the regulation precludes a reasonable return on the value of the building, has the owner been denied substantive due process?

FACTS

(1)

In 1965, New York City, acting pursuant to state enabling legislation, provided for landmark preservation by adding Section 2004 to the New York City Charter and Chapter 8-A (Sections 205-1.0 et seq.) to the Administrative Code (Local Law #46). Section 205-1.0 of the Code set forth the purpose and public policy behind the enactment (A76a).\* The Council

\*Numbers preceded by the letter A refer to pages in the Appendix to the Jurisdictional Statement. Numbers not preceded by the letter A refer to pages in the Record on Appeal in the Court of Appeals.

set forth its findings and declared as a matter of policy that the "protection, enhancement, perpetuation and use of improvements of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety, and welfare of the people."

Section 2004 of the New York City Charter establishes a Landmarks Preservation Commission, composed of 11 members including at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor; also the membership shall include at least one resident of each of the five boroughs.

It is the Commission's task, after public hearing, to designate landmark properties and historic districts. Admin. Code §207-2.0(A84a). The Board of Estimate is to approve, disapprove or modify the designation, but, before it does so, the Board "shall refer such designation or amendment thereof to the City Planning Commission, which, within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plan for the renewal of the area involved."

Once a landmark is designated, the ordinance requires that those in charge of it keep it "in good repair." Section 207-10.0 (A104a). In addition, the

Commission is authorized to regulate construction, reconstruction, alteration and demolition on a landmark site. Section 207-4.0 (A88a). Comprehensive procedures are provided where one wishes to make such changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be exterior effect, a permit for minor work or a "certificate of appropriateness." Section 207-5.0-207-7.0 (A90a-93a). As to taxpaying commercial properties, there is also a procedure for seeking a certificate of appropriateness authorizing demolition on the ground of insufficient return. A similar procedure, providing for different forms of relief, is available to certain tax-exempt properties used for charitable purposes. Section 207-8.0 (A94a).

(2)

Related to the Landmarks Law are certain amendments to the New York City Zoning Resolution, which permit the transfer of unused development rights over landmark properties located in certain high density areas of the City to other nearby sites. Zoning Resolution, Sections 74-79 to 74-793 (All3a-118a). The transfer of these rights will permit the owner of a designated landmark building to realize an economic gain by selling his unsued, but allowable development rights. City Planning Commission's Report (CP-20253), dated May 1, 1968.

The original May 1968 transfer provisions authorized the City Planning Commission to grant a special permit for the transfer of development rights to adjacent sites. The maximum amount of

floor area that could be transferred was the basic maximum allowable floor area on the zoning lot less the total floor area of all buildings on the landmark lot (in effect, the total unused development rights), but the permitted floor area increase on any recipient lot was limited to 20% of the floor area otherwise permitted on the recipient site. Common ownership was not necessary.

In December 1969, Sections 74-79 et seq. of the Zoning Resolution were amended to expand the availability of transfers of development rights from landmark properties. In central business districts, the 20% limitation as to the recipient lots was removed (All3a). In addition the definition of adjacent lot was expanded to include also lots across the street from the landmark site. Penn Central has

a significant number of properties which come within this definition. See Exhibit 10, p. 1966, indicating such properties.

(3)

Grand Central Terminal was opened to the public in 1913. The architect for the Terminal was selected by nationwide competition. Reed & Stem of St. Paul, Minnesota won the competition introducing, inter alia, the concept of ramps. Later, Whitney Warren of Warren and Wetmore took over the architectural design of the Terminal and introduced the fine Beaux Arts facade. Also of note are the scale of the monumental columns, the handsome sculptured details, the main concourse with the constellations painted by Paul Heller, and the monumental statuary group (Mercury, Hercules, and Minerva) atop the 42nd Street facade (see photographs at pages

2232-2238 of the Record in the Court of Appeals and Defts.' Exhs. D1-5).

On August 2, 1967, after a public hearing, the City's Landmarks Preservation Commission proposed the designation (later accepted by the Board of Estimate) of the Terminal as a landmark (2240-2241). In its report it stated, inter alia (2240):

"Grand Central Station, one of the great buildings of America evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style it represents the best of the French Beaux Arts."

(4)

On January 22, 1968, after the designation of Grand Central Terminal as a landmark, UGP, a United Kingdom corporation, entered into a lease and sublease

arrangement which provides for the "demise" of the development rights over Grand Central Terminal to UGP for the purpose of constructing an office building of approximately 56 stories over the Terminal and, in part, replacing portions of the landmark structure (1872-1957).

On July 18, 1968, the plaintiffs applied to the Landmarks Commission for a certificate of no exterior effect for the so called Breuer I plan (Breuer referring to the architect), a speculative office tower to be cantilevered over Grand Central Terminal. This request was denied on September 20, 1968 (13a, 25a, 2242, 331-336). On January 20, 1969, the plaintiffs applied to the Landmarks Commission for a certificate of appropriateness either for Breuer I or for a new proposal, Breuer II (2242). Prior to the public hearing

on the matter, it was discovered that the land on which Breuer II was proposed to be built included land over which the plaintiffs did not have control and that Breuer II would have interfered with certain existing New York City easements (2242-2243). Consequently plaintiffs prepared new plans, Breuer II Revised, to avoid these problems (1998-2002, 2252).

On August 26, 1969, a certificate of appropriateness was denied for all of the above proposals. In its report denying the certificate, the Landmarks Commission described the public hearings, described the two proposals and summarized the arguments that had been made. It also referred to alternatives that had been proposed for the transfer of development rights to nearby sites (2247). The

Commission concluded that the proposed towers would not be appropriate to and consistent with the effectuation of the purposes of the Landmarks Law (2242-2255).

The plaintiff did not seek judicial relief by way of a special proceeding pursuant to Article 78 of New York Civil Practice Law and Rules from the designation of Grand Central Terminal as a landmark, from the denial of a certificate of appropriateness, or from the denial of the certificate of no exterior effect.

(5)

On October 7, 1969, the plaintiffs initiated this lawsuit seeking declaratory and injunctive relief from the Landmarks Law on its face and as applied, and "compensation" for the alleged temporary taking of their property for the period between its designation as a landmark and

the judicial invalidation of such designation (7a-21a). A trial was held in which the evidence was presented by the parties with respect to plaintiffs' claims of hardship.

At the conclusion of the trial, the Supreme Court found that plaintiffs had proven economic hardship (A70a). The Supreme Court relied primarily on the income and expense statements submitted by the plaintiffs for 1969 and 1971, which showed that for those two years the revenues from the Terminal concessions were less than the expenses (A57a-58a). The Supreme Court did not attribute any value to the transfer of the unused development rights to other properties owned by Penn Central (A58a).

The Appellate Division of the Supreme Court of the State of New York (two justices dissenting) reversed the Supreme Court and dismissed the complaint (A27a). Reported at 50 AD 2d 265, 377 N.Y.S. 2d 20 (1st Dept., 1975). The Court, citing this Court's decision in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), found that the plaintiffs had not demonstrated that the challenged regulation deprived them of all reasonable beneficial use of their property (A26a-27a). With respect to the income and expense statements of 1969 and 1971 submitted by Penn Central, the Appellate Division noted that the statement had listed the income from the concessions but had listed, in the expense portion, railroad operating expenses as well as expenses of the concession business. In addition, no rental

value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes (A25a). The Appellate Division also found, inter alia, that the plaintiffs had not shown that the unused development rights could not be profitably transferred to other sites (A25a-26a).

In its order the Appellate Division set forth findings of fact and stated that the findings of fact made by the New York Supreme Court, accompanying the judgment appealed from, which were inconsistent with the findings of the Appellate Division, were reversed (A46a-47a). The findings of the Appellate Division are set forth in A47a-50a of the Jurisdictional Statement.

The Court of Appeals of the State of New York unanimously affirmed the order of the Appellate Division (A15a). Reported at

42 NY 2d 324, 366 N.E. 2d 1271 (1977). In its opinion the Court recognized the principle that government regulation would be invalid if it denied a property owner all reasonable return (A2a). The Court found that the plaintiffs had not demonstrated that the subject parcel, as restricted, was incapable of earning a reasonable return (A9a, 13a). The Court noted that a significant part of the value of the Terminal property was the result of governmental action such as tax exemptions, favored monopolies at public expense and subsidies (A7a-8a). The Court stated that the economic return of Grand Central should include an imputed value based on the increased business in the hotels and office buildings owned by Penn Central which is generated by the presence of the Terminal (A9a-10a).

The Court also found that the unused development rights over Grand Central had significant value and could be transferred to a number of other properties owned by Penn Central (Al1a-12a, 13a). It noted that construction of new office buildings was given serious consideration on two of the available receiving parcels, the sites of the Biltmore and Roosevelt Hotels (Al2a, 13a).

In concluding, the Court stated that Penn Central could present in the New York State Supreme Court any "additional submissions which, in light of this opinion may usefully develop further the factors discussed" (Al4a).

## ARGUMENT

THE FEDERAL CONSTITUTIONAL QUESTION RAISED ON THIS APPEAL IS INSUBSTANTIAL. WHERE A MUNICIPAL BUILDING REGULATION IS CHALLENGED ON ECONOMIC GROUNDS, BUT IT IS NOT ESTABLISHED THAT THE REGULATION PRECLUDES A REASONABLE RETURN ON THE VALUE OF THE BUILDING, THE OWNER OF THE PROPERTY HAS NOT BEEN DENIED SUBSTANTIVE DUE PROCESS.

(1)

Where parties attack a land use regulation as unconstitutional and confiscatory, the burden is on them to establish sufficient facts to overcome the presumption of its constitutionality. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-593, 595-596 (1962). Thus, although the exercise of the police power to regulate the private use of real property is not without limitation, it is for the plaintiff in a particular case to establish that the line

separating valid regulation from confiscation has been breached.

Where the line will be drawn depends on an examination and balancing of three elements: how important the regulation is to the public good; how reasonably the regulation serves to achieve that good; and how substantially the regulation affects the economic viability of the particular parcel. In Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), this Court set forth these three considerations as providing the test of the constitutionality of an ordinance prohibiting excavation below the water table. Preliminarily this Court found that, although the ordinance completely prohibited the plaintiff's sand and gravel mine and deprived the property of its most beneficial use, this did

not make it unconstitutional (pp. 592-593, 596). Nor did constitutionality hinge on whether the use prohibited was a common law nuisance (p. 593). This Court noted (p. 594): "Although a comparison of values before and after regulation is relevant, see Pennsylvania Coal Co. v. Mahon, [260 U.S. 393 (1922)], it is by no means conclusive, see Hadachek v. Sebastian, [239 U.S. 394 (1915)], where a diminution in value from \$800,000 to \$60,000 was upheld." In Goldblatt, this Court, applying the threefold test, concluded that the plaintiff had failed to meet its burden of presenting evidence sufficient to overcome the presumption of constitutionality. 369 U.S. at p. 596.

These principles have been applied where property has been restricted because of historic preservation legislation.

In Maier v. City of New Orleans, 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976), the Court of Appeals upheld the authority of the City of New Orleans to enact an architectural control ordinance applicable to the French Quarter of New Orleans. In dismissing the complaint, the Court of Appeals stated that the plaintiff was not entitled to relief because he could not demonstrate that the subject property, as restricted, could not yield a reasonable rate of return.

See also, Figarsky v. Historic District Commission of City of Norwich, 171 Conn. 198, 368 A. 2d 163, 171 (1976); First Presbyterian Church of York v. City Council of the City of York, 25 Pa C. 154, 360 A. 2d 257, 261 (Commonwealth Ct. of Pa., 1976); Redman v. City of Springfield,

111 ILL. App. 2d 430, 250 N.E. 2d 282 (1969); Opinion of the Justices to the Senate, 333 Mass. 773, 783, 128 N.E. 2d 557, 563 (1955); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P. 2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A. 2d 232 (1964). Cf. Benenson v. United States, 548 F. 2d 939, 949 (Ct. Cl., 1977) (where a series of actions of the federal government over a fourteen year period were held to be an inverse condemnation because the designation precluded any profitable use of property).

In its Jurisdictional Statement, Penn Central agrees that it is now well established that landmarks legislation is an appropriate objective of governmental

action in the pursuit of public welfare (p. 11). As we noted above, the owner of property, in attacking a police power restriction on land use, must demonstrate hardship. The most appropriate proof would be to show that the parcel, as restricted, is incapable of producing a reasonable return. Plaintiffs have not met their burden.

There has been a complete failure of proof in the instant case. The plaintiffs' primary argument was that the Terminal, considered as a separate entity was unprofitable. As we discussed above, in support of that position the plaintiffs submitted a Statement of Revenues and Costs for the Terminal for 1969 and 1971 (2088-2091). These statements were prepared specifically for litigation (887, 896, 919). The statements reported the revenues from the concessions in the Terminal and deducted

expenses, many of which were attributable to the operation of the entire Terminal. The statement did not include any imputed rental value for those parts of the Terminal used for railroad purposes, including track areas, offices, storage and amenities (915, 2266, 2268).

In its order dismissing the complaint, the Appellate Division of the New York Supreme Court, in its findings of fact, stated that the statements of expenses and revenues were inaccurate because of their failure to impute rental value (A49a). In its findings of fact, the Appellate Division also rejected the other proof submitted by the plaintiffs on the question of economic return (A45a-50a). It also noted that the plaintiffs had failed to show that unused development rights could not have been profitably

transferred to one or more nearby sites (49a). In their proof the plaintiffs had ascribed no value to the transfer of development rights (A49a). The findings stated that the plaintiffs had failed to meet their burden of establishing that the Terminal was incapable of earning a reasonable rate of return (A48a).

Each of these findings of fact was affirmed by the New York Court of Appeals. Plaintiffs cannot attack these factual findings on this appeal. Indeed, plaintiffs in their Jurisdictional Statement state that they are not pressing their factual argument to this Court (p. 7, fn. 7).

These findings of fact preclude any argument by the plaintiffs that they have been denied substantive due process. These confirmed findings of fact demonstrate that the plaintiffs have failed to

establish that the parcel, as restricted, is incapable of earning a reasonable return. Thus, plaintiffs have not met any part of their burden of proof as is required by Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), in an action attacking the constitutionality of the legislation as applied to their parcel.

The Jurisdictional Statement objects to the factors considered by the Court of Appeals in determining whether the plaintiffs demonstrated that the subject parcel, as restricted, is incapable of producing a reasonable rate of return. Such factors as the value added to Penn Central's real estate holdings in hotels and office buildings because of their proximity to the Terminal and government aid in the development of the Terminal are proper considerations in determining

value. However, this Court has noted that there are no specific criteria in determining reasonableness in an individual case. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

The Court of Appeals also found that Penn Central received value in the potential grant of the unused transfer development rights (Alla, 12a). The testimony showed that the unused development rights could have been profitably transferred to two receiving parcels, the sites of the Biltmore and Roosevelt Hotels (481-485, 1331, 1676-1678). As we noted above, the New York Court of Appeals confirmed the finding of fact of the Appellate Division that the plaintiffs had failed to sustain their burden of proof on this issue.

In Goldblatt, supra, this Court noted that it could not determine that the ordinance was unreasonable because the plaintiff had failed to produce sufficient evidence 369 U.S. at p. 594. The instant case involves a similar failure of proof. Even if the factors used by the plaintiffs in their presentation in the New York State Supreme Court were used to determine whether the plaintiffs had been denied a reasonable rate of return, there is still no deprivation of due process, since as to each of such factors, the New York State courts made findings of fact that the plaintiffs had not proved their allegations.

CONCLUSION

THE APPEAL SHOULD BE  
DISMISSED FOR WANT OF A SUB-  
STANTIAL FEDERAL QUESTION.

November 16, 1977.

Respectfully submitted,

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NOV 29 1977

MICHAEL RODAK, JR., CLERK

No. 77-444

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGP PROPERTIES,  
INC.,

*Appellants,*

*v.*

THE CITY OF NEW YORK, *et al.*,

*Appellees.*

On Appeal from the Court of Appeals  
of New York

**REPLY BRIEF FOR APPELLANTS**

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November, 1977

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On Appeal from the Court of Appeals  
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**REPLY BRIEF FOR APPELLANTS**

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The admittedly novel concepts of valuation and compensation devised by the court below raise truly substantial federal questions that should be reviewed by this Court. Contrary to the view urged by the City of New York ("the City"), it is not the state of the record that is presented for review, but the constitutional principles created by the court below that require owners of private property to bear the full burden of landmark preservation.

## I.

**THE DECISION BELOW DOES NOT REST  
ON PRINCIPLES ELUCIDATED IN ZONING CASES.**

To argue, as the City does in its Motion to Dismiss, that this case involves no more than a challenge to a land-use regulation that has been denied for insufficient evidence misconceives the actual holding of the court below. Motion 18, 25-26.<sup>1</sup> That court explicitly stated that "[t]his is not a zoning case." J.S. App. 4. Indeed, it went on to say that since the burden of a landmark designation "is borne by a single owner," this case resembles "discriminatory" zoning that is "properly condemned." J.S. App. 5-6. It concluded, however, that such discrimination was acceptable "when landmark regulation is involved." J.S. App. 6.

Virtually the only decision of this Court cited by the City is *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). That *was* a zoning case, involving a safety ordinance of general applicability that limited mining operations within the city limits of an expanding community. It is not pertinent here and was not even cited by the court below. While zoning and historic-district statutes operate in "furtherance of a general community plan," J.S. App. 5, the designation of Grand Central Terminal as a landmark forms no part of any such general plan. The City's effort to ignore the construction placed on the Landmarks Law by the court below

<sup>1</sup> The Motion to Dismiss the City of New York and the Landmarks Preservation Commission of the City of New York (hereafter, the "Landmarks Commission") will be cited as "Motion"; the Jurisdictional Statement and its Appendix filed by the Penn Central Transportation Company and the other appellants (hereafter referred to collectively as "Penn Central") will be cited as "J.S." and "J.S. App."

should not be permitted to divert attention from the novel legal principles on which that court felt impelled to rest its decision.

In addition, the City cites several decisions by lower Federal courts or State courts. Motion 21-22. Those cases uniformly involve the regulation of historic districts, regulations similar in effect and intent to zoning laws.<sup>2</sup>

As the court below recognized, J.S. App. 5, the designation of Grand Central Terminal as a landmark does not involve a historic district. It involves one building—the Terminal. Buildings next to the Terminal or down the street from it are unaffected—except as they may be benefited by the designation. Only Grand Central is frozen in its present form. The distinction between zoning and historic-district regulation on the one hand, and the designation of particular buildings as landmarks on the other is important for Due Process Clause analysis. In *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), the court of appeals declared that the historic-district ordinance at issue there "is of general application to a well-defined geographic area." 516 F.2d at 1061. Indeed, the Fifth Circuit explicitly stated that the purpose of the ordinance was to preserve "the 'tout ensemble' of the historic French Quarter." *Id.* at 1067. There is no "tout ensemble" at issue here—there is

<sup>2</sup> The most closely analogous of all the cases cited by the City is *Benenson v. United States*, 548 F.2d 939, 212 Ct. Cl. — (1977). That case also involved historic-district legislation, but there the Court of Claims held that the government's actions with respect to the Willard Hotel in Washington, D.C. *did* amount to a taking. Just compensation to the hotel's owners was therefore required.

only one building, selected from the thousands of buildings in Manhattan. It is that building alone on which the City has imposed drastic restrictions and prohibitions.

As Penn Central has urged, J.S. 9-15, the controlling principles of the decision below are so novel and of such potentially far-reaching importance that a full review on the merits by this Court is warranted. The City's invocation of zoning and historic district decisions, which the court below regarded as inapplicable, does nothing to refute this contention.

## II.

### THE CITY'S EVIDENTIARY ANALYSIS IS IRRELEVANT TO WHETHER PROBABLE JURISDICTION SHOULD BE NOTED.

The City's contentions that "[t]here has been a complete failure of proof" in this case, Motion 23, are wholly beside the point. Penn Central is *not* asking for a review of findings of fact, nor would any such review be necessary to reach a decision on the merits of this case. It is undisputed that Penn Central has been precluded by the actions of the Landmarks Commission from constructing an office building over the Terminal and receiving revenues from the rental of that building. Designating the Terminal as a landmark reduced the prospective rentals (at least \$3 million annually) to zero, as complete a "taking" as is possible. It is not, therefore, the state of the evidence that is important here. Rather, it is the retreat by the court below from the principles that have heretofore governed the application of the Due Process Clause in order to facilitate landmark preservation by local governmental units, particularly those "in financial distress." See J.S. 12-14.

The Motion to Dismiss, not surprisingly, chooses to ignore important aspects of the court's evaluation of transferable development rights (TDR's). Motion 25-27. The court strongly criticized the TDR's as having "many defects," being "severely limited," and requiring "complex procedures . . . to obtain a transfer permit." J.S. 17. Nonetheless, it concluded that despite their deficiencies the TDR's were "fair" compensation "for the limited purposes of a landmarking statute." J.S. App. 2-3, 13-14. It thus held that if any compensation were required for the loss of Penn Central's development rights over Grand Central, it need only be "fair."

The decision of the court below is not in this or any other respect a narrow evidentiary holding. It forthrightly asserts a special rule for landmark preservation: no inquiry into just compensation is necessary; an owner is entitled to nothing, despite the value of the property rights taken, unless it can be shown that there is no prospect of earning, sometime in the future, a reasonable return on the property retained, taking into account all other property owned in the vicinity and ascribing value to highly questionable TDR's. In so holding, the court acknowledged the novelty of, and lack of authority for, its analysis and, in essence, invited review by this Court, J.S. App. 14.<sup>3</sup>

<sup>3</sup> If this Court noted probable jurisdiction and reversed the Court of Appeals by holding that "just" rather than merely "fair" or no compensation is required here, the actual amount of the compensation could be determined on remand in the State courts in New York. This Court would have no need to engage in property valuation or financial analysis.

## III.

**THE CITY HAS OFFERED NO PRECEDENTS OF THIS COURT IN SUPPORT OF THE NOVEL PRINCIPLES ADOPTED BELOW.**

The City has not even attempted to answer the arguments advanced in the Jurisdictional Statement as to why this Court should note probable jurisdiction. For instance, there has been no mention of the national importance of the issues presented. *See* J.S. 9-11. Further demonstrating the significance of this litigation, an informed commentator recently observed that the decision of the court below "may be the most important historic landmark preservation case yet decided." "TDR and Landmark Preservation Win Major Court Victory," 36 *Urban Land*, September, 1977, at 16.

Likewise, the City makes no attempt to justify the central reasoning of the court below that "compensation" in a landmark case may properly be limited to the value of property created exclusively by "private" efforts. J.S. App. 2, 7. Since many if not all of the evidentiary matters the City deems so important are ultimately controlled by the governing principle of law involved, it is critical that the proper constitutional standard be made clear. The court below has adopted a standard without precedent in this Court's decisions, or those of any other court. That the City is unwilling even to attempt a rebuttal convincingly demonstrates the novelty of the holding of the court below on this crucial question.

One of the cases cited by the City, *Benenson v. United States, supra*, provides a graphic example of how the rationale of the court below would operate if it were allowed to stand as a precedent. If the Court of Claims had had available and had applied the holding below

in *Benenson*, it would have considered the "social complex" in which the structure for which just compensation was sought (the Willard Hotel) existed. It would have noted the proximity of the White House and numerous Federal agencies and the hotel's location on Pennsylvania Avenue. Based on this analysis, it would have concluded that "society . . . has created much of the value" (J.S. App. 7) of the hotel, and limited compensation accordingly.

The actual approach of the Court of Claims in *Benenson v. United States, supra*, is in such stark contrast to the analysis of the court below in the present case that it strongly suggests a conflict between state and federal courts on this basic constitutional question. Following standard Due Process Clause principles, the Court of Claims in *Benenson* found a taking by the government and required just compensation. No effort was made to distinguish between "private" and "social" elements of value. The analysis applied below, on the other hand, rested the decision on just such a purported distinction—a distinction which the City in its Motion to Dismiss wholly ignores.

**CONCLUSION**

For the foregoing reasons, and for the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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Supreme Court, U. S.

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No. 77-444

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGP PROPERTIES,  
INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,

*Appellees.*

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On Appeal from the Court of Appeals  
of the State of New York

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**BRIEF FOR APPELLANTS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
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STREET REALTY CORPORATION, UGP PROPERTIES,  
INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,

*Appellees.*

On Appeal from the Court of Appeals  
of the State of New York

**BRIEF FOR APPELLANTS**

**OPINIONS BELOW**

The opinion of the New York Court of Appeals is reported at 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, and 366 N.E. 2d 1271 (1977). It is set out in Appendix A of the separately bound Appendix to the Jurisdictional Statement. The opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 50 App. Div. 2d 265 and 377 N.Y.S. 2d 20 (1975). That opinion and the accompanying order and findings of fact by the Appellate Division are set out in Appendix

B to the Jurisdictional Statement. The findings of fact and declarations of law, memorandum decision, orders and judgment of the Trial Term of the New York Supreme Court are not officially reported. They are set out in Appendix C to the Jurisdictional Statement.

### JURISDICTION

The final judgment of the New York Court of Appeals, the highest court of the state, was entered on June 23, 1977. Appellants filed a Jurisdictional Statement on September 20, 1977, and this Court noted probable jurisdiction on December 5, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court: *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Street v. New York*, 394 U.S. 576, 581-85 (1969); *Jamison v. Texas*, 318 U.S. 413, 414 (1943).

### STATUTES INVOLVED

Pertinent portions of the New York City Landmarks Preservation Law, New York City Charter and Administrative Code, ch. 8-A, and applicable New York zoning resolutions are set forth in Appendix E to the Jurisdictional Statement. Pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States are set forth in Appendix F to the Jurisdictional Statement.

### QUESTIONS PRESENTED

Does the social and cultural desirability of preserving aesthetic landmarks through government action derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

Is Penn Central entitled to no compensation for that portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to be attributable to the efforts of "society as an organized entity"?

Does a finding that Penn Central has failed to establish that there is no possibility that it can earn a reasonable return on its remaining properties in and near the Terminal warrant the conclusion that it is not entitled to compensation for the taking of its air rights above the Terminal?

Does the possibility accorded to Penn Central of realizing some value at some time by transferring the Terminal development rights to other nearby buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation?

### STATEMENT OF THE CASE

Penn Central Transportation Company<sup>1</sup> owns the Grand Central Terminal, located in mid-town Manhattan. The Terminal was opened for operations in 1913 and serves as the terminus for a number of railroad lines. As originally designed in the early 1900's, the Terminal was intended as a combined railway station and office building, although the latter was never built.

<sup>1</sup> Penn Central Transportation Company, certain of its affiliates and UGP Properties, Inc., (hereafter referred to collectively as "Penn Central") are the appellants in this case. UGP Properties, Inc., is a New York corporation and is not affiliated with the other appellants. (J.A. 33-34)

(An artist's conception of the combined terminal and office building is reproduced at J.A. 90).<sup>2</sup> As the Trial Term of the New York Supreme Court found, the Terminal is physically "deteriorating at a substantial rate." (J.S.A. 53)

In August, 1967, over the objection of Penn Central, the Landmarks Preservation Commission of the City of New York (hereafter, the "Landmarks Commission") designated the Terminal and its site as a "landmark" and a "landmark site" respectively. (J.S.A. 53) The Landmarks Commission acted pursuant to authority conferred upon it by a municipal ordinance of New York City, the Landmarks Preservation Law (hereafter, the "Landmarks Law").<sup>3</sup> The effect of the landmark designation was to bar any construction on the site and any alteration of the exterior appearance of the Terminal without prior approval of the Landmarks Commission. N.Y.C. Admin. Code §§ 207-5.0-207-7.0 (J.S.A. 90-93). Moreover, Penn Central is required to keep the Terminal "in good repair." *Id.*, § 207-10.0 (J.S.A. 104). Criminal sanctions could be imposed for violation of the Landmarks Commission order. *Id.* § 207-16.0 (J.S.A. 108-09).

Because of Penn Central's precarious financial condition—a condition which ultimately led to its being ordered into reorganization on June 21, 1970—Penn

<sup>2</sup> References to the Joint Appendix will be designated as "J.A. —." References to the Appendix to the Jurisdictional Statement will be designated as "J.S.A. —."

<sup>3</sup> The stated purpose of the Landmarks Law is to prevent the "irreplaceable loss to the people of the city" that might be caused by the alteration or destruction of landmarks. N.Y.C. Admin. Code § 205-1.0 (J.S.A. 76).

Central decided to develop its unused air rights above the Terminal. It entered into arms-length negotiations with UGP Properties, Inc., (hereafter, "UGP") resulting in a lease agreement signed on January 22, 1968. Under the terms of the lease, UGP was to construct and operate a multi-story office building over the Terminal. The term of the lease was for fifty years, and UGP retained an option for another twenty-five years. (J.S.A. 53-54) The lease provided that UGP would pay Penn Central \$1,000,000 per year during construction of the office building; after its completion, Penn Central was guaranteed at least \$3,000,000 per year, plus additional amounts based on the total space actually rented. UGP also agreed to assume a portion of Penn Central's real estate taxes, estimated to be nearly \$600,000. Some existing rental properties (netting between \$700,000 and \$1,000,000 annually) would be lost because of construction required for the foundations of the office building. (J.S.A. 48)

UGP retained the architectural firm of Marcel Breuer & Associates to design the proposed office building. In compliance with the Landmarks Law, Penn Central and UGP submitted the Breuer design to the Landmarks Commission and applied for a "Certificate of No Exterior Effect."<sup>4</sup> Granting the Certificate

<sup>4</sup> This original design by the Breuer firm would not have changed the facade of the Terminal. Moreover, and like the two alternative designs later submitted, it was in conformity with the applicable New York zoning regulations (as distinguished from the Landmarks Law). No party to this litigation has ever disputed that the Breuer designs conformed to the zoning law.

There are numerous other buildings in the area near Grand Central as large as, or nearly so, as the proposed building over the Terminal. The Pan American building, for instance, is depicted in relation to Grand Central at J.A. 110.

would have permitted construction to go forward. N.Y.C. Admin. Code § 207-5.0 (J.S.A. 90-91). On September 20, 1968, however, the Landmarks Commission denied the application. Penn Central then applied for "Certificates of Appropriateness," N.Y.C. Admin. Code § 207-6.0 (J.S.A. 91-93), submitting the original Breuer plan and two revisions as alternatives. The last of these applications was denied by the Landmarks Commission on August 26, 1969.

Having no further possible remedies before the Landmarks Commission,<sup>5</sup> Penn Central and UGP instituted this action on October 7, 1969. They sought declaratory and equitable relief and money damages, alleging, *inter alia*, that the actions of the Landmarks Commission (prohibiting construction of an otherwise lawful office building over the Terminal) constituted a taking of private property without just compensation in violation of due process and equal protection of the laws.<sup>6</sup> The Trial Term of the New York Supreme Court agreed, and declared the application of the Landmarks

<sup>5</sup> The Landmarks Law provides that after a denial of an application either for a Certificate of No Exterior Effect or a Certificate of Appropriateness, certain landmark owners may apply for relief because of insufficient return (defined as less than six percent per year of the property's valuation). This relief was not available to Penn Central, however, because it is not extended to railroad property having partial real-estate tax exemption. N.Y.C. Admin. Code § 207-8.0a(2) (J.S.A. 95). As the dissent in the Appellate Division points out, Grand Central is the only such property which has been designated as a landmark. 377 N.Y.S. 2d at 32 (Lupiano, J., dissenting). (J.S.A. 30)

<sup>6</sup> The claims for monetary compensation were severed from the other constitutional issues and judgment on them reserved by the Trial Term of the New York Supreme Court. (J.S.A. 60-61)

Law to Grand Central Terminal unconstitutional. (J.S.A. 51-60, 61-73)

The City of New York and the Landmarks Commission appealed. The Supreme Court's Appellate Division reversed the trial court, upholding the constitutionality of the Landmarks Law as applied and finding that there had been no compensable taking. Two of the five justices dissented, essentially adopting the rationale of the Trial Term. (J.S.A. 16-50)

In affirming the decision of the Appellate Division, the New York Court of Appeals accepted as a central premise that the preservation of landmarks is so socially and culturally desirable that private property taken by the government to achieve such preservation is not entitled to the same compensation as private property taken for other public uses. (J.S.A. 2-3)

It distinguished the Landmarks Law from both zoning and historic-district regulation (J.S.A. 4-5), noting that "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan" (J.S.A. 5), and that "the burden of limitation is borne by a single owner" who "may or may not benefit from that limitation." (*Id.*)

The court reasoned, however, that there was no "constitutional imperative" that a property owner's economic return "embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests." (J.S.A. 2) In so doing, the court sought to draw a distinction between the "ingredient of property value" created by "the efforts of the property owner" and the "ingredient" created "by the accumulated indirect

social and direct government investment in the physical property, its functions, and its surroundings." (J.S.A. 1-2, 9) For "the limited purposes of a landmarking statute," the court held that "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (J.S.A. 2-3) In applying that criterion the court concluded that Penn Central was not entitled to compensation for the loss of its Terminal air rights because it had failed to prove that it would be impossible for it to earn a reasonable return on the balance of its properties in the Terminal area. (J.S.A. 9)<sup>7</sup> It was on the basis of this conclusion that the court determined there was "no taking for which just compensation must be paid." (J.S.A. 5)

Alternatively, the court held that Penn Central had not in any event been "wholly deprived of the development rights above the Terminal," because those rights had been made "transferable" under certain conditions to other nearby properties. (J.S.A. 11) While noting the "many defects" of the City's "transferable development rights" (hereafter, "TDRs") program,<sup>8</sup>

<sup>7</sup> In the New York courts, Penn Central presented substantial evidence that it could not earn, either before or after Grand Central's designation as a landmark, a reasonable return on the Terminal. Penn Central does not press that claim here because this factual question becomes immaterial once the Court of Appeals' error of law in abandoning the just-compensation rule is reversed.

<sup>8</sup> "Transferable development rights" in theory permit a landmark owner to convey to a limited number of nearby properties the right to develop his own property. The rights that can, in theory, be conveyed equal the maximum allowable floor area on the landmark lot less the floor area actually utilized by the landmark. The transferee owners, also in theory, are then permitted to build on their properties to an extent that exceeds the otherwise applicable zoning regulations. Under New York City's plan, the TDRs are not created by the Landmarks Law but by separate zoning resolutions.

and acknowledging that such rights "may not be equivalent in value" to the development rights taken from Penn Central, the court concluded that the TDRs "are valuable" and provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (J.S.A. 13-14) Thus, for "the limited purposes of a landmarking statute," (J.S.A. 2-3) the TDRs were considered by the court to be sufficient—even though not "just"—compensation.

#### SUMMARY OF ARGUMENT

The Court of Appeals, in fashioning special rules to facilitate landmark preservation by government action, has approved the taking of private property without payment of just compensation.

The private property that has been taken consists of the air rights to build above the Grand Central Terminal. The court did not contest, as this Court has held, that an owner is constitutionally entitled to compensation for the taking of air space above his land. *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962); *United States v. Causby*, 328 U.S. 256, 260-63 (1946). The court erred, however, in holding "for the limited purposes of a landmarking statute" that compensation need not be paid for such portion of the value of air rights that the court asserted to be attributable to the "efforts of organized society" or the "social complex in which the Terminal is situated." (J.S.A. 2-3) The

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The transfer of development rights is permitted in any case to any property owner holding contiguous parcels of land; in the case of landmark owners, the extent to which transfers are allowed is somewhat enhanced. (J.S.A. 113-18) See Marcus, "Air Rights Transfers in New York City," 36 J.L. Contemp. Prob. 372, 373-75 (1971). See also J.A. 30-31.

novel distinction drawn by the court between the "social" and "private" ingredients of private property is supported by no decision of this Court, and is inconsistent with well-established principles governing the valuation of property for purposes of just compensation. *United States v. Fuller*, 409 U.S. 488, 492-93 (1973); *United States v. Reynolds*, 397 U.S. 14, 16-17 (1970); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

The Landmarks Law clearly operated to "take" Penn Central's property interests in the air rights above the Terminal. *United States v. Dickinson*, 331 U.S. 745, 798 (1947). A "taking" for constitutional purposes does not depend upon a formal transfer of title to the taker, *United States v. Cress*, 243 U.S. 316, 328 (1917), or physical occupation of the air space in question by the taker. *United States v. Causby, supra*. The "political ethics" reflected in the Due Process Clause prevent the public from forcing private owners to bear burdens which should properly be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). That principle is as applicable to landmarking statutes as it is to all other government actions.

The Court of Appeals acknowledged that "[t]his is not a zoning case," (J.S.A. 4) thus correctly distinguishing it from such earlier decisions of this Court as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and recognized that Penn Central bore the full burden of the Landmarks Law with no compensating benefits. The court erred, however, in holding that the taking of Penn Central's air rights without com-

ensation was nonetheless permissible unless Penn Central met the burden of proving that it was incapable of ever earning a reasonable return on its remaining properties near the Terminal. Prior decisions of this Court make clear that an owner is entitled to just compensation for property taken regardless of the value of its remaining property or its prospects of earning a reasonable return on such remaining property. *United States v. Fuller, supra*; *United States v. Causby, supra*, 328 U.S. at 262.

The alternative holding of the Court of Appeals that the compensation received by Penn Central for its air rights was constitutionally sufficient, even though not "just," is also erroneous. The assertedly "fair" compensation provided by the City was the opportunity to transfer the air rights over the Terminal to a highly limited number of nearby properties. The value of these "transferable development rights" ("TDRs"), if any, is highly speculative and uncertain. The court recognized that the TDR program contained "many defects," that the area of transferability was "severely limited" and that "complex procedures are required to obtain a transfer permit." (J.S.A. 11) Rights of such concededly uncertain and contingent value fall far short of established just-compensation standards. *Bauman v. Ross*, 167 U.S. 548, 584 (1897). There is no justification for viewing them, as the court below did, as all that the Constitution requires "for the limited purposes of a landmarking statute." (J.S.A. 2-3)

The decision of the court below should be reversed and the case remanded for a determination of the appropriate level of compensation to be awarded to Penn Central.

### ARGUMENT

Penn Central makes no claim that the preservation of buildings of historical or aesthetic importance is an impermissible objective of governmental action in pursuit of the public welfare. *Berman v. Parker*, 348 U.S. 26 (1954); *Roe v. Kansas*, 278 U.S. 191 (1929); *United States v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896).<sup>9</sup> What is challenged is the holding of the court below that where government seeks to achieve cultural or aesthetic goals—through such devices as the Landmarks Law—it can avoid the constitutional imperative of just compensation that has long governed the taking of private property for all other public needs.<sup>10</sup>

<sup>9</sup> In all these cases the governmental action in question was approved as an exercise of the eminent-domain power and was accompanied by just compensation to the property owners affected. See also *Flaccomio v. Mayor & City Council of Baltimore*, 71 A.2d 12 (Md. 1950); *Pontiac Improvement Co. v. Board of Com'rs*, 135 N.E. 635 (Ohio 1922).

<sup>10</sup> Penn Central argues here that the City of New York's action violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. While that amendment does not contain the express language of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation."), the constitutional protections are the same. As this Court said in *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 239 (1897),

"since the adoption of the Fourteenth Amendment compensation for private property taken for public use constitutes an essential element in 'due process of law . . .'" (quoting from Mr. Justice Jackson's opinion as Circuit Judge in *Scott v. Toledo*, 36 F. 385, 395-96 (C.C.N.D. Ohio 1888).

To the same effect, see *Olson v. United States*, 292 U.S. 246, 254 (1934); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *McCoy v. Union Elevated R.R.*, 247 U.S. 354, 363 (1918). The same result is reached under the "incorporation doctrine." *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963).

In the first section of this brief it will be shown that the Terminal air rights constitute Penn Central's private property whatever may have been the contribution of organized society to the value of those rights. The next section consists of a summary analysis of the decisions of this Court that establish that Penn Central's property has been "taken," within the meaning of the Fifth and Fourteenth Amendments, by the City of New York through the operation of the Landmarks Law. Finally, it will be shown that the TDRs provided by the City of New York do not constitute just compensation for the property that has been taken by the City and that the case should be remanded for a determination of the amount of compensation to which Penn Central is entitled.

### I. PENN CENTRAL'S RIGHT TO CONSTRUCT AN OFFICE BUILDING OVER GRAND CENTRAL TERMINAL IS VALUABLE PRIVATE PROPERTY FULLY PROTECTED BY THE CONSTITUTION.

The Court of Appeals effectively concedes, as a matter of State law, that the right to develop the air space above Grand Central is a valuable property interest (known as "air rights"). (J.S.A. 1-2, 12)<sup>11</sup> Decisions of this Court would permit no other conclusion; they have taken a broad and practical view of the constitutional protection afforded private property. In *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), this Court defined property as

"the group of rights inhering in the citizen's relation to the physical thing, as the right to possess,

<sup>11</sup> See also Marcus, "Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks," 24 Buff. L. Rev. 77, 89-92 (1974).

use and dispose of it . . . . The constitutional protection is addressed to *every sort of interest the citizen may possess.*" (emphasis added)

See also *Terrace v. Thompson*, 263 U.S. 197 (1923); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917); Restatement of Property § 5, comment e (1936). See also *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Each of the "bundle" of rights of which property consists is entitled to constitutional protection, as the courts long ago recognized. See, e.g., *Eaton v. Boston, C. & M. R.R.*, 51 N.H. 504, 511-12 (1872); *Parks v. Boston*, 15 Pick. (32 Mass.) 198, 203 (1834); Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale L. J.* 16, 20-25 (1913).<sup>12</sup> In exercising his "dominion of the physical thing," 323 U.S. at 380, the property owner may choose to exploit the full quantum of rights available to it at one time, or it may choose to exercise them at different points over a longer period. The latter is what Penn Central did with the Terminal property. It first used part of its property rights to build the Terminal. It then decided in 1968 to utilize the remainder of its air rights by arranging for the construction of the office building above the Terminal.<sup>13</sup>

<sup>12</sup> In addition to the economic factors to be considered in Due Process Clause cases, there are also equitable considerations:

"in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893).

<sup>13</sup> As noted previously, p. 5 n.4, *supra*, the various designs for the office tower were all within applicable New York zoning ordinances.

That the "right to develop" above the Terminal is not a corporeal object is no bar to holding that it is nonetheless property, as the court below recognized. This Court has afforded constitutional protection to a wide variety of intangible rights. In *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960), for instance, materialmen's liens were held to be property protected by the Fifth Amendment. Similarly, in *United States v. Virginia Electric Co.*, 365 U.S. 624, 627 (1961), a flowage easement over an owner's land was deemed to be a protected property interest.

Directly pertinent here are those cases that have recognized as compensable under the Fifth Amendment a property right to use the air space above an owner's land. In *United States v. Causby*, 328 U.S. 256 (1946), the government was held to have taken an easement over the owner's property for the flight paths of military airplanes landing on an airstrip near the property. Even though the planes did not actually land on or otherwise occupy the property in question, "[t]he owner's right to possess and exploit the land—that is to say, his beneficial ownership of it. . .," *id.*, at 262, was limited by the noise of the flights. That limitation was held to be a compensable taking. The *Causby* decision was followed in *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962), where this Court said

"the use of land presupposes the use of some of the airspace above it . . . . Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."<sup>14</sup>

<sup>14</sup> The United States has, in other contexts, recognized that an owner whose right to develop above his property is limited by governmental action must be compensated. Thus, in *United States v. 29.28 Acres of Land in Wayne Township, N.J.*, 162 F. Supp. 502

See also *Portsmouth Co. v. United States*, 260 U.S. 327 (1922); 2 *Nichols on Eminent Domain*, § 5.7811 at p. 5-300.1 (1976); 4 *id.* § 13.24. Ball, "Division into Horizontal Strata of the Landspace Above the Surface," 39 *Yale L.J.* 616 (1930). Cf. Eckert, "Acquisition of Development Rights: A Modern Land Use Tool," 23 *U. Miami L. Rev.* 347 (1969).<sup>15</sup>

While the Court of Appeals did not dispute that the air rights above the Terminal constitute a valuable property interest, it did develop a new theory of valuing property, one wholly at odds with the Due Process Clause. As noted in the Statement of the Case, *supra*, pp. 7-8, the court below attempted to separate the "ingredient of property value" created by the owner's efforts from the "ingredient" created by the "accumulated indirect social and government investment in the physical property, its functions, and its surroundings." (J.S.A. 1-2, 9) It referred to some undefined

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(D.N.J. 1958) the government brought condemnation proceedings to secure, *inter alia*, a "line of sight" easement on lands surrounding a proposed Nike missile base. This easement would require that the owners substantially restrict their rights to develop the property in question. Just compensation was awarded.

<sup>15</sup> The Court of Appeals ignored the fact that Penn Central's development of the air rights over its sunken railroad tracks made Park Avenue "one of this nation's most prestigious residential communities." 377 N.Y.S. 2d at 25 (J.S.A. 20).

As one treatise puts it,

"The practice of purchasing or leasing airspace or otherwise acquiring rights in airspace is quite common in large urban areas today." Wright, *The Law of Airspace* 211 (1968).

See also 4 *Nichols*, *supra*, § 13.24; Machen, "Air Rights Development," 34 *Appraisal J.* 288 (1966); White, "George Washington Bridge Approach: A Case Study," 34 *Appraisal J.* 32 (1966); Nelson, "Appraisal of Air Rights," 23 *Appraisal J.* 495 (1955).

(and in fact undefinable) "social complex in which property rests," (*id.* 2) as part of the basis for its conclusions.

The court below, not surprisingly, offered no precedent for its novel analysis. In fact, the theory underlying that analysis has repeatedly been rejected by this Court, most recently in *United States v. Fuller*, 409 U.S. 488 (1973). In that case, the principal issue was the appropriate value to be paid as just compensation for the taking of an owner's fee interest in certain grazing lands. The owner used those fee lands together with public lands under revocable permit from the United States. In his condemnation award, he sought compensation for the value added to the fee lands through their actual or potential use together with the lands available under revocable permit from the government. This Court disallowed the claim for the added value, and made the following statement, highly important for purposes of the present case:

"we believe that there is a significant difference between the value added to property by a completed public works project, *for which the Government must pay*, and the value added to fee lands by a revocable permit authorizing the use of neighboring lands that the Government owns. The Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office. *Id.* at 492-93. (emphasis added)

In this case, therefore, Penn Central is entitled to the full value of its Terminal air rights at the time of taking no matter where in the "social complex" the Terminal may be located, and no matter what other

members of society or the government may have done or failed to do at some time in the past to enhance or to decrease that value.<sup>16</sup>

The decision in *United States v. Fuller, supra*, is consistent with several earlier decisions of this Court. In *United States v. Reynolds*, 397 U.S. 14, 16-17 (1970), the majority opinion states that

"the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, *the general rule of just compensation requires that such enhancement in value be wholly taken into account . . .*" (emphasis added)

Accord, *United States v. Twin City Power Co.*, 350 U.S. 222, 227 (1956); *United States v. Miller*, 317 U.S. 369, 376-77 (1943); *Benenson v. United States*, 548 F.2d 939, 212 Ct. Cl. — (1977).

This Court's opinions thus make it clear that "property" is not to be divided artificially into "social" and "private" components in instances such as that involved here. All private property could be subject to the same analysis—to attempt to do so would be to create a principle that could not be contained. Indeed

<sup>16</sup> This Court early on took a pragmatic view of the economics of property valuation:

"Neighborhood to the centres of business and population largely affects values. For that property which is near the centre of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but a few, and commands but a small rental." *Monongahela Navigation Co. v. United States, supra*, 148 U.S. at 328.

the court below conceded that the so-called public and private contributions were "inseparably joint." (J.S.A. 9)<sup>17</sup> The analysis undertaken by the Court below is applicable not only to Grand Central but also to a private residence taken for a city park or a farm taken for an interstate highway. If it were so extended, the Due Process Clause would be rendered ineffectual as a restriction on government taking of private property.<sup>18</sup>

Thus, while recognizing that the air rights over the Terminal were property within the meaning of the Due Process Clause, the Court of Appeals severely limited the scope of the "property" rights that it considered to be at issue. In so doing, the court laid part of the foundation for its holding that there was no "taking" by operation of the Landmarks Law, and its further holding that "just compensation" need not be awarded to Penn Central. Because of the fundamentally erroneous appreciation of the property rights at stake, therefore, the court below should properly be reversed.

<sup>17</sup> Merely as one example of the intractable problems that would be caused by adopting the analysis of the court below, is the following passage from its opinion: "[w]ithout people Grand Central would never have been a successful railroad terminal . . ." (J.S.A. 7) There is no doubt that this statement is correct. But can there be any exercise more pointless than endeavoring to value Grand Central *without* people? The distinction proposed by the court below between "social" and private ingredients of property thus leads precipitously to a complete *reductio ad absurdum*.

<sup>18</sup> As Mr. Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon, supra*, "the natural tendency of human nature is to extend the [police power] . . . more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 415.

**II. PENN CENTRAL'S PROPERTY INTEREST IN DEVELOPING THE AIR RIGHTS OVER THE TERMINAL WAS CLEARLY "TAKEN" FOR CONSTITUTIONAL PURPOSES BY THE OPERATION OF THE LANDMARKS LAW.**

The Court of Appeals asserted that the Landmarks Law was an application of permissible government regulation rather than use of the power of eminent domain." (J.S.A. 1) Consistently with that conclusion, the court also ruled that there was "no taking for which just compensation must be paid." (J.S.A. 5) These conclusory holdings appear to rest on two premises. The first is that there is a compelling reason why landmarks should be treated differently from other forms of private property—"the cultural, architectural, historical, or social significance attached to the affected parcel." (J.S.A. 6) Secondly, the court reasoned that as long as the landowner has prospects of earning a reasonable return on such property as it continues to own, the designation of some portion of its property as a landmark, with consequent preclusion of further development, does not constitute a taking. These premises will be examined in turn.

**A. There Is Nothing Unique About the Preservation of Landmarks That Renders Constitutional Safeguards Less Applicable Than in the Taking of Private Property for Other Governmental Objectives.**

However praiseworthy the desire to preserve historically or culturally significant buildings, the merits of that goal do not warrant treating such structures

<sup>19</sup> As this Court has previously stated,

"A claim that action is being taken under the police power of the State cannot justify disregard of constitutional inhibitions." *Panhandle Co. v. Highway Comm'n*, 294 U.S. 613, 619 (1935).

any differently from other forms of property in the application of constitutional rights.<sup>20</sup> Yet the Court of Appeals based its decision in large measure on the distinction between landmark preservation on the one hand and government utilization of property for all other purposes on the other. The court said explicitly that its holding rested on "the limited purposes of a landmarking statute." (J.S.A. 2-3)

The effect of the court's ruling is to except the Landmarks Law from long-standing Due Process Clause analysis. As with many of the salient points in its opinion, the court below offers no precedential support for its holding on this issue. At least one State court has flatly rejected this exception in similar circumstances:

"It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense." *People v. Ramsey*, 171 N.E. 2d 246, 247 (App. Ct. Ill. 1960).

This Court should also reject a separate constitutional framework for the landmark statute challenged here.

It is plain that

"[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public

<sup>20</sup> Mr. Justice Holmes provided the appropriate warning a half century ago:

"[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 416.

as a whole." *Armstrong v. United States*, *supra*, 364 U.S. at 49.

This view was fully supported by scholars and jurists writing at the time the Fifth Amendment was drafted. *See, e.g.*, Sax, "Takings and the Police Power," 74 *Yale L.J.*, 36, 54-60 (1964); Dunham, "A Legal and Economic Basis for City Planning," 58 *Colum. L. Rev.* 650, 665 (1958).

In any society, the costs of government will not be distributed totally equally. In this country, however, the right to just compensation when property is taken "prevents the public from loading upon one individual more than his just share of the burdens of government . . . ." *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 325; *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 428-30 (1935). The Due Process Clause thus embodies a "political ethics," *United States v. Cors*, 337 U.S. 325, 332 (1949), that protects private property against even the most popular measures of confiscation. Cormack, "Legal Concepts in Cases of Eminent Domain," 41 *Yale L.J.* 221, 224 (1931).

Acknowledging that it was creating a special principle for landmarking statutes, the court below stated flatly that "[t]his is not a zoning case." (J.S.A. 4) Similarly, the court also rejected an analogy to historic-district regulation. (*Id.* 5) Referring to zoning, but in terms equally applicable to historic-district laws, the court said that "[z]oning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefitted and restricted from exploitation . . . ." (*Id.* 4) In fact, "both an owner and his

neighbors benefit to some degree and in some manner from zoning and historic districting." (*Id.* 5) Landmark ordinances, by contrast, "are not designed to further a general community plan." (*Id.*) Moreover, in the case of landmark regulation, "the burden of limitation is borne by a single owner." (*Id.*) Thus, not only does Penn Central bear the entire burden, it receives no benefit whatever from preserving Grand Central as a landmark.

The Court of Appeals thus convincingly and correctly distinguished this case from such prior decisions of this Court as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). Indeed, as the court below agreed, the only possible resemblance the present case has to the law of zoning is to

"'discriminatory' zoning restrictions, *properly condemned*, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations." (J.S.A. 6) (emphasis added)

How then is the Landmarks Law to be saved by the court below from invalidity? Only by reference again to the special purposes of a landmarking law. (*Id.* 6) As just discussed, however, that fact alone cannot justify ignoring the requirement that a taking of private property be accompanied by just compensation to the property owner.

**B. The Anticipated Economic Return to Penn Central from the Terminal and Other Nearby Buildings Is Immaterial in Deciding Whether or Not There Has Been a Taking of Its Terminal Air Rights by Operation of the Landmarks Law.**

The Court of Appeals held that there was no taking in the present case because "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (J.S.A. 2-3) The court went on to say that the Terminal

"may be capable of producing a reasonable return for its owners even if it can never operate at a profit." (*Id.* 9)

Because Penn Central had failed to prove that the Landmarks Law "eliminates all reasonable return" on the Terminal and other nearby buildings owned by Penn Central, the court held that the Law did not violate the Constitution. (*Id.* 13-14) "

The court's analysis is replete with erroneous legal principles. The first is the very concept of "reasonable return." That return is to be provided, under the court's view, only for the "privately created" ingredient of the Terminal's value. Yet the Court of Appeals itself recognized that the so-called "public" and "private" contributions to the Terminal were "inseparably joint." (*Id.* 9) See pp. 16-19, *supra*. The method by which these "inseparable" elements are to be separated is not provided by the court. Moreover, the court agreed that the idea of "reasonable return" was "elusive," "incapable of easy definition" and involved an

<sup>21</sup> In this Court, the City of New York's Motion to Dismiss Penn Central's appeal rested in large measure on the issue of the profitability of the Terminal and the sufficiency of the proof offered below. See Motion to Dismiss 22-28.

"obvious" and "inevitable circularity of reasoning." (J.S.A. 6)

The evidentiary obstacles inherent in the Court of Appeals' standard would be virtually impossible to surmount. The speculative nature of the proofs to be offered guarantees that proceedings under the court's standards will be protracted and burdensome." Yet the Court of Appeals provides no guidelines for future litigants. By its own admissions, therefore, the court below conceded that the standard it proposed can never be sufficiently concrete for Due Process Clause purposes. To borrow a phrase from First Amendment case law, the "reasonable return" standard is surely "void for vagueness."

More importantly, the concept of reasonable return on remaining properties is simply not sanctioned by any prior decision of this Court. In other cases where property rights were taken, compensation has been required whether or not any remaining property interest could still earn a reasonable return. For example, in *United States v. Causby, supra*, the property owner's chicken-raising business was all but destroyed by the taking of a flight-path easement near his farm. The Court held that such action constituted a taking, notwithstanding that "[s]ome value would remain":

"The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard

<sup>22</sup> The court below held, for instance, that "the Terminal acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises." (J.S.A. 10) Proving that the Terminal is not a "magnet," as the court below would require Penn Central to do, is (like attempting to prove any negative contention) virtually impossible to do.

to a vegetable patch, a residential section to a wheat field . . . . But the use of the airspace immediately above the land would *limit* the utility of the land and cause a *diminution* in its value." 328 U.S. at 262 (emphasis added).

See also *Griggs v. Allegheny County, supra*; *Portsmouth Co. v. United States, supra*. This Court did not consider whether Mr. Causby could still earn a "reasonable return" by using his land as a vegetable patch. In any event, in the present case, Penn Central receives *no* return from the unutilized air rights; that can hardly be deemed a reasonable return under any circumstances.

This point can be demonstrated further by a simple illustration. Imagine a property owner, half of whose land is devoted to farming, and half to cattle grazing. Imagine further that the government expropriates the grazing land for a public use, and the owner seeks to receive just compensation for it. He is met by the government's argument that no compensation need be awarded because the owner is making a "reasonable return" on his farm land. Under the rationale of the court below, the government's argument would prevail. Similarly, if the City of New York had condemned for public use one of Penn Central's other buildings near the Terminal, the Court of Appeals' ruling would dictate that Penn Central would be entitled to no compensation unless it could prove that its remaining buildings could not earn a reasonable return. No decision of this Court supports such a result.

Quite to the contrary, *United States v. Fuller, supra*, also demonstrates the error of the Court of Ap-

peals' reasoning in this respect. In *Fuller*, the government condemned 920 of 1,280 acres held in fee by the owner and used for grazing purposes. 409 U.S. at 488-89. Following the logic of the court below, the proper inquiry by this Court should have been whether the owner could have earned a "reasonable return" on the remaining 360 acres. Obviously, no such exercise was undertaken, nor was one required under the Due Process Clause. The court below has once again simply developed its own unique and unprecedented theories "for the limited purposes of a landmarking statute." (J.S.A. 2-3) <sup>23</sup>

What is in fact at stake here is the property actually taken—Penn Central's air rights over the Terminal. The property left to Penn Central and the return on that property are immaterial in any consideration of the loss of the air rights. It bears stressing again that these rights are not a mere potential utili-

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<sup>23</sup> It makes no constitutional difference that the present case concerns several rights in the same piece of land while *United States v. Fuller, supra*, involved one right in several "pieces" (acres) of land. As previously discussed, "property" consists of a "bundle of rights," whether considered as the range of possibilities for use or the geographic extent of the territory involved. The Supreme Judicial Court of New Hampshire long ago recognized this common-sense view of "taking":

"[r]estricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former?" *Eaton v. Boston, C. & M. R.R.*, 51 N.H. 504, 512 (1872).

In *Eaton*, the court held that the property owner was entitled to recover for damages his land sustained during a freshet because of various pieces of construction by the defendant railroad.

zation of the existing property. They are vested property rights in and of themselves, that, as the next subsection shows, the operation of the Landmarks Law has extinguished.

The concept of a "reasonable return" has an appealing ring. It may properly have a useful role in public-utility ratemaking and similar matters where an ongoing business is subject to reasonable governmental regulations. But it has nothing whatever to do with cases under the Due Process Clause where an owner's property is appropriated by the government, and it should be rejected by this Court.

**C. The Court Below Erred in Holding That the Operation of the Landmarks Law Did Not "Take" Property from the Penn Central.**

By rejecting the two premises on which the Court of Appeals rested its conclusion that there was no "taking" in the present case (i.e., a special constitutional standard for landmarks and the return on remaining properties), it becomes clear that the operation of the Landmarks Law did in fact amount to a taking for Due Process Clause purposes. Penn Central's air rights above the Terminal, within applicable zoning regulations, were as completely extinguished by the Landmarks Commission as if an existing tower had been destroyed by a City demolition crew.

Mr. Justice Frankfurter, speaking for this Court in *United States v. Dickinson*, 331 U.S. 745, 748 (1947), elucidated the constitutional standard for deciding when a "taking" occurs:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of

it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

*See also Armstrong v. United States, supra*, 364 U.S. at 46; *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at 414; 2 *Nichols, supra*, § 6.3 at p. 6-65."

The Landmarks Commission's actions did impose a "servitude" on Penn Central's property, and in a dramatic fashion. Penn Central is now absolutely barred from utilizing the air rights above the Terminal to construct the office tower UGP had agreed to build, operate, and lease. These actions by the City constitute a "taking" even though the City of New York has not formally had title to the property transferred to it. *United States v. Causby, supra*; *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Lynah*, 188 U.S. 445, 470 (1903) ("While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested."); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-69 (1884); 2 *Nichols, supra*, § 6.1[1], at p. 6-8." Nor does

"The Supreme Court of Oregon recently held that

"[t]he proper test to determine whether there has been a compensable invasion of the individual's property rights . . . is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone." *Thornburg v. Port of Portland*, 415 P.2d 750, 752 (Ore. 1966).

"As one commentator put it

"[t]he obligation to pay compensation is not to be escaped by simply declining to acquire title." Michelman, "Property,

it matter that the City has not itself physically occupied the air space in question. *United States v. Causby*, *supra*, 328 U.S. at 264-65; *United States v. General Motors Corp.*, *supra*, 323 U.S. at 378 ("the deprivation of the former owner . . . constitutes the taking."); Berger, "A Policy Analysis of the Taking Problem," 49 *N.Y.U.L. Rev.* 165, 171 (1974); Michelman, *supra*, 80 *Harv. L. Rev.* at 1228. To reach a different result—to hold that no taking had occurred—would allow government to achieve by indirection what it is forbidden to do overtly. *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 177-79 (1871).<sup>28</sup>

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Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harv. L. Rev.* 1165, 1186 (1967).

Professor Michelman goes on to point out that what the just-compensation requirement protects against is the

"capacity of some collective actions to imply that someone may be subjected to immediately disadvantageous or painful treatment for no other apparent reason, and in accordance with no other apparent principle than that someone else's claim to satisfaction has been ranked as intrinsically superior to his own." *Id.* at 1225.

Here, preserving the cultural significance of Grand Central was deemed by the Landmarks Commission to be "intrinsically superior" to the Penn Central's desire to utilize its air rights. In such circumstances, designating Grand Central as a landmark constitutes a taking.

<sup>28</sup> Professor Ackerman, noting several of the ways that the government can obtain control over land, has observed:

"[a]ll that is required is that a state representative effectively assume the owner's right to control the use of the property." Ackerman, *Private Property and the Constitution*, 242 *n.26* (1977).

The operation of the Landmarks Law has in fact put a "state representative"—the Landmarks Commission—in effective control of the air space over Grand Central.

*United States v. Cress*, *supra*, provides a good illustration of this Court's practical response to takings involving less than the full fee interest. In *Cress*, the owner's land was subject to periodic floodings because of a government-built lock and dam. The trial court found that these periodic floodings reduced the value of the lands by one half. 243 U.S. at 318. In this Court, the government argued that such a reduction of value did not constitute a "taking" for which the United States was liable. This Court rejected that argument, holding that a taking had occurred. It noted, in affirming the damages award of the trial court, that

"[i]f any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land." 243 U.S. at 328.

Much the same pattern occurred here. Penn Central was permanently divested of its valuable air rights. That act by the City constitutes a taking even though the railroad Terminal remains.

Likewise, in *Curtin v. Benson*, 222 U.S. 78 (1911), the private owner of land within the boundaries of Yosemite National Park brought an action against the Park Superintendent, who had prevented the owner from grazing his cattle on the land in question. The owner challenged the Department of the Interior regulations under which the Superintendent allegedly acted, and this Court declared them invalid. Noting that the owner's right "to pasture his cattle upon his land" was "the very essence of his proprietorship," this Court held that

"[t]o take it away is practically to take his property away, and to do that is beyond the power even

of sovereignty, except by proper proceedings to that end." *Id.* at 86.

Thus a practical restriction of a property owner's right is a taking for which just compensation is owed. See also *Eaton v. Boston, C. & M. R.R.*, *supra*, 51 N.H. at 511-12; *Benenson v. United States*, *supra*.

The government of the City has undeniably decided that by declaring the Terminal a landmark, it has conferred benefits on the citizens of New York. (J.A. 66-67) As the Court of Appeals said, "Grand Central Terminal is no ordinary landmark"; indeed, it rests "in the greatest megalopolis of the western hemisphere." (J.S.A. 7) Preventing alteration of the Terminal saves part of New York's "glorious past" and prevents "mortgaging its hopes for the future." (*Id.* 14) Grand Central is frozen for the benefit of New Yorkers and visitors to the City, and Penn Central pays the costs. Such an enhancement of the government's resource position at the expense of private landholders is plainly a "taking" for Due Process Clause purposes." Van

<sup>27</sup> Professor Ernst Freund found the distinction between a compensable taking and a noncompensable exercise of the police power to be

"that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Freund, *The Police Power* 546-47 (1904).

Obviously in the present case New York precluded alteration of Grand Central because it believed that so doing would be "useful to the public." That is a political decision, and one that New York might properly make, but, under Professor Freund's test, implementing that decision represents a taking for which just compensation must be paid. See Michelman, *supra*, 80 Harv. L. Rev. at 1196.

Alstyne, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 *So. Cal. L. Rev.* 1, 23-26 (1970); Note, "Landmark Preservation Laws: Compensation for Temporary Taking," 35 *U. Chi. L. Rev.* 362 (1968); Sax, *supra*, 74 *Yale L. J.* at 61-67. Cf. *Aronson v. Town of Sharon*, 195 N.E.2d 341 (Mass. 1964) (large-lot zoning ordinance designed to encourage leaving land in its natural state for recreational purposes, and that provided no compensation to property owners, held unconstitutional).

### III. PENN CENTRAL IS ENTITLED TO RECEIVE JUST COMPENSATION FOR THE TAKING OF ITS AIR RIGHTS ABOVE GRAND CENTRAL TERMINAL.

Penn Central has demonstrated that its property was in fact taken as a result of the City's application of the Landmarks Law to Grand Central Terminal. By now, it is axiomatic that when government takes private property for public use, it must pay full and just compensation for the taking to be constitutional. *E.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951); *United States v. Lynah*, 188 U.S. 445, 465 (1903); *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 336. The court below concluded, however, that even if there were a taking of Penn Central's air rights by operation of the Landmarks Law, it was not entitled to receive "the 'just' compensation required in eminent domain. . . ." (J.S.A. 12)

1201; Dunham, "Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law," 1962 *Sup. Ct. Rev.* 63, 75, 80.

**A. There Is No Constitutional Basis for Awarding Penn Central Anything Less Than Just Compensation.**

In sustaining the Landmarks Law's application to Grand Central Terminal, the Court of Appeals asserted that Penn Central had not been "wholly deprived" of its development rights over the Terminal, but rather "[t]hose rights have been made transferable to other parcels of land in the vicinity . . ." of Grand Central. (J.S.A. 11) However, the court did not even suggest, much less determine, that the TDRs provided Penn Central with just compensation for the taking it had suffered. On the contrary, the court expressly conceded that transferable "[d]evelopment rights . . . may not be equivalent in value to development rights on the original site." (J.S.A. 12) In other words, the court recognized that the TDRs do not afford Penn Central the full and just compensation required by the Constitution.

To avoid a ruling of unconstitutionality, the Court of Appeals returned once more to its untenable assertion (*see* pp. 28-33, *supra*) that there has been no taking of Penn Central's property. For this reason, the court claimed, the compensation provided Penn Central "need not be the 'just' compensation required in eminent domain . . ." (J.S.A. 12) Instead, the court deemed the TDRs sufficient here simply because they provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (J.S.A. 13-14) This holding eliminates any doubt that the Court of Appeals recognized the TDRs could satisfy only some lesser standard than "just" compensation, namely, "fair" compensation.

To be sure, both the words "just" and "fair" have equitable roots, but it is clear from the decision below

that the Court of Appeals was not using the terms synonymously.<sup>22</sup> It so indicated by its citation to an article by the leading TDR theorist. Costonis, "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 *Colum. L. Rev.* 1021 (1975). *See* J.S.A. 11-12. Professor Costonis states straightforwardly that his theory of "fair" compensation is a standard "[l]ess demanding than just compensation." 75 *Colum. L. Rev.* at 1022 (emphasis added).

In resorting to a lesser standard than "just" compensation, the Court of Appeals apparently was again relying on "the limited purposes of a landmarking statute" (J.S.A. 2-3) to avoid the constitutional imperatives of the Due Process Clause. Under whatever guise, however, the rationale of the court below is inadequate. If property is taken by the government, *just* compensation must be paid or the taking cannot constitutionally be permitted. Since the Court of Appeals conceded that just compensation was not awarded to Penn Central here, a concession required by the record (J.A. 31-32, 40-49, 52-60), the application of the Landmarks Law to Grand Central Terminal should be declared unconstitutional. Any other result would open a wide breach in the protections afforded by the Due Process Clause, and deprive property owners of the assurance that their assets will not be expropriated capriciously. Whatever the supposed merit of the political or economic reasons for creating such a breach, the Constitution does not permit it.<sup>23</sup>

<sup>22</sup> The court below also characterized the TDRs as "reasonable compensation." (J.S.A. 12) What is said in the text about "fair" compensation applies to the "reasonable" characterization as well.

<sup>23</sup> The explanation of the Court of Appeals' decision may lie largely in the well-publicized financial condition of New York City.

**B. The TDRs Fall Far Short of the Constitutional Requirement That Penn Central Be Justly Compensated for What It Lost Through Operation of the Landmarks Law.**

This Court has repeatedly stressed that the determination of just compensation for particular property is a "judicial function," and "no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923). *Accord, United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 327. The need for judicial determination of "just" compensation is, of course, a result of the basic principle that "[i]t is emphatically the province and duty of the judicial department to say

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After concluding that the Landmarks Law was constitutional as applied to the Grand Central Terminal, the court observed:

"In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." (J.S.A. 14)

Neither affluence nor penury, however, determines the reach of basic constitutional guarantees.

To whatever extent, therefore, New York City's financial condition may have influenced the drafters of the Landmarks Law or the court below, the objective of such legislation may not be accomplished through unconstitutional means. *Pumpelly v. Green Bay Co.*, *supra*, 80 U.S. (13 Wall.) at 177-78; *United States v. Gettysburg Electric Ry.*, *supra*, 160 U.S. at 680; *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 415. The City's financial embarrassment, regrettable as it may be, does not warrant the subversion of constitutional protections.

what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

In its role as constitutional arbiter, this Court has laid down a variety of requirements with regard to "just" compensation. Most fundamentally, this Court has made clear that "just" compensation requires that the owner of taken property receive as compensation an amount equal to whatever is determined to be the property's value. *See, e.g., Danforth v. United States*, 308 U.S. 271, 283 (1939); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 312. In the present case, there should be no difficulty in ascertaining such value. It has already been recognized in the agreement between Penn Central and UGP. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). UGP and Penn Central agreed in 1968 upon the terms of a lease by which construction and operation of the office building would be undertaken, and that provides the best evidence of the value of the Terminal air rights. No party to this litigation has ever disputed that this agreement was reached after arms-length bargaining, or that the lease price is reasonable.

In many instances where this Court has been faced with questions of valuation, owners have claimed compensation for uses to which their property might be put, but which they had not yet been able to effect. This Court recognized that in such instances the proposed use had to be taken into account for valuation purposes.<sup>80</sup> Moreover, in the present case, there is no need

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<sup>80</sup> *United States v. Fuller*, *supra*, 409 U.S. at 490; *United States v. Virginia Electric Co.*, *supra*, 365 U.S. at 630; *McCandless v. United States*, 298 U.S. 342, 345 (1936); *Olson v. United States*, *supra*, 292 U.S. at 255; *Boom Co. v. Patterson*, 8 Otto (98 U.S.) 403, 408 (1878); *United States v. Causby*, *supra*, 328 U.S. at 261.

to hypothesize about the feasibility of the project. UGP and Penn Central had agreed to go forward with utilizing the air rights, and only the Landmarks Law stood in their way.

A further requirement laid down by this Court is that "there must be at the time of the taking 'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974), quoting from *Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 641, 659 (1890).<sup>31</sup> The only provision made for compensation in the Landmarks Law is in the form of the TDRs. This Court has effectively made clear that for such non-monetary benefits as the TDRs to constitute "'reasonable, certain and adequate'" constitutional compensation, their value must at least be "capable of present estimate and reasonable computation." *Bauman v. Ross*, 167 U.S. 548, 584 (1897).

The TDRs simply cannot satisfy these constitutional requirements to provide Penn Central just compensation for the taking it has suffered. The Court of Appeals itself conceded that the value of the TDRs, if any, was highly speculative and uncertain. It discussed at length the "many defects" of the TDR program, noting that the geographic area in which transfers are permitted is "severely limited," and that "complex procedures are required to obtain a transfer permit." (J.S.A. 11) The court's analysis accorded with its decision in an earlier case, where it described the TDRs

<sup>31</sup> See also *Boom Co. v. Patterson*, *supra*, 8 Otto (98 U.S.) at 408; *McCandless v. United States*, *supra*, 298 U.S. at 345-46; *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 328-29.

as having an "uncertain and contingent market value" that "did not adequately preserve" the value of the rights taken by the Landmarks Law. *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 591, 385 N.Y.S. 2d 5, 7, *appeal dismissed*, 429 U.S. 990 (1976).

Indeed, even those who are proponents of TDRs as a device to preserve landmarks have severely criticized the New York ordinance. Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 *Harv. L. Rev.* 574, 586-89 (1972). Those criticisms are worth examining in detail.

First, the applicable New York zoning regulations already permit the transfer of development rights to "contiguous parcels" of land. *Id.* at 586.<sup>32</sup> The TDRs afforded landmark owners such as Penn Central merely permit transfers to lots across the street from the landmark, or to "lots within a chain of common ownership extending to the landmark lot." Marcus, *supra*, 24 *Buff. L. Rev.* at 92. It is apparent, therefore, that the TDRs represent only a very marginal increment of flexibility over what is available to any other real property owners in the City. See, pp. 7-8, n. 8, *supra*. It certainly is open to serious question whether the value of this marginal increment of flexibility is susceptible of "reasonable computation"; and, in any event, any *de minimis* additional value that is measurable can hardly suffice to satisfy the constitutional requirement of just compensation in the present case, where Penn Central has been completely deprived of its air rights over Grand Central Terminal itself.

<sup>32</sup> "Contiguous parcels" are viewed as one "lot" for zoning purposes, and hence an owner could develop his single lot as he chose—spreading the bulk of his building evenly over the lot or concentrating it on part of the parcel.

Moreover, even if the TDRs available to landmark owners can be assumed to represent a significantly greater amount of transferability than that available to other property owners, the market for landmark TDRs is extremely confined. There can hardly be a sufficient market demand for the TDRs that would permit Penn Central to receive the full compensation to which it is entitled for loss of development rights over the Terminal. Indeed, the Court of Appeals concedes that the only effective way for Penn Central to use its TDRs is to demolish such existing structures as the Biltmore Hotel, and to build even larger office towers in their places. (J.S.A. 11; *compare* J.S. 31-32, 40-49) By so confining the available uses of the TDRs, New York has—as one commentator observed—further contributed to rendering “virtually worthless” these so-called “rights.”<sup>33</sup> Note, “The Unconstitutionality of Transferable Development Rights,” 84 *Yale L. J.* 1101, 1109 (1975).

Second, the administrative procedures which a landmark owner is required to follow to transfer the de-

<sup>33</sup> By contrast, the Chicago plan for landmark preservation creates a “transfer district” in the downtown area of Chicago that substantially enlarges the available market within which TDRs can be sold. Costonis, “Development Rights Transfer: An Exploratory Essay,” 83 *Yale L. J.* 75, 86-91 (1973); 2A Nichols, *supra*, § 7.519 [2][b] at p. 7-248.19. By eliminating the “adjacency” requirement of the New York Landmarks Law, the Chicago Plan is intended, unlike the New York program, “to compensate the landmark owner for the actual losses he suffers.” Costonis, *supra*, 85 *Harv. L. Rev.* at 591.

Penn Central does not assert here that the Chicago Plan necessarily satisfies the Due Process Clause requirement of just compensation. The contrast between the New York and Chicago programs, however, does graphically illustrate how seriously deficient the New York scheme is.

velopment rights are truly “labyrinthine.” Costonis, *supra*, 85 *Harv. L. Rev.* at 587. When the owner finds a prospective buyer for some or all of its TDRs, the owner must first obtain the permission of the Landmarks Commission to make the transfer. The Commission, in its discretion, must decide whether the structure embodying the transferred rights will be “compatible” with the landmark. Then, the owner and the potential transferee must secure the approbation of the Planning Commission of the City of New York, which may withhold approval for almost any number of reasons within its almost totally discretionary judgment. The prior decision of the Landmarks Commission will be considered, but it is not controlling. Finally, the New York Board of Estimate must also approve; again, its action is entirely discretionary. 2A Nichols, *supra*, § 7.519[2] at pp. 7-248. 9-10 & n.45. (J.A. 38-40) As a matter of common sense, it is clear that following this tortuous path will take years of effort, expense and travail. As Professor Costonis aptly observes,

“[t]he maze of discretionary approvals based upon vague aesthetic, planning and urban design criteria are hardly calculated to attract the voluntary participation of developers and landmarks owners.” Costonis, *supra*, 85 *Harv. L. Rev.* at 587.

Thus, even if a prospective purchaser for the TDRs could be found, fruition of the transaction must await the unknowable decisions of political decisionmakers. Clearly, such a procedure precludes any determination here that there existed at the time of the taking the “‘reasonable, certain and adequate provision for obtaining compensation,’” required by *Bauman v. Ross*, *supra*, 167 U.S. at 584. Nor does the present procedure

meet the requirement of promptness of *Crozier v. Krupp*, 224 U.S. 290, 306 (1912); cf., *Eubank v. Richmond*, 226 U.S. 137 (1912).

Third, and finally, it is Penn Central that must bear the risk of realizing any value through the transfer of development rights. Placing the burden of obtaining "just compensation" on the property owner does not satisfy the guarantee of the Due Process Clause. When the government takes property, it is the government that must assure payment of the compensation owed; otherwise, ultimate receipt of compensation by the owner would not be "certain," as it plainly must be.<sup>34</sup> As the Supreme Judicial Court of Massachusetts said in *Parks v. Boston*, "the true rule of justice" is "to pay the compensation with one hand, whilst [the government] apply the axe with the other . . . ." 15 Pick. (32 Mass.) 198, 208 (1834).

In sum, as the court below effectively acknowledged, the inadequacies of the TDRs are so great that they

<sup>34</sup> Once again, there are alternatives to forcing on the owner the difficult task of marketing the TDRs. One such alternative would involve a "development rights bank":

"[i]n such a system the landmark owner is compensated in cash for the taking, and the city bears the burden of recouping the cost of the landmark preservation program by selling the development rights directly to developers." Note, 84 Yale L.J., *supra* at 1113.

A development rights bank would thus ensure just compensation to the property owner at the time of taking, the time compensation is generally due. See, e.g., *Bauman v. Ross*, *supra*, 167 U.S. at 598. Moreover, if the TDRs are in fact equivalent to the value of the development rights taken from the owner, the City of New York should have no trouble marketing them. Use of a development rights bank, therefore, would mean equitable treatment for the property owner and no extra burden for the City. By contrast, New York's TDR system imposes all of the hardships on the property owner.

simply cannot satisfy New York City's constitutional obligation to pay "just" compensation for the taking of Penn Central's property. In a phrase familiar to the drafters of the Fifth Amendment, the TDRs are "not worth a continental." They are not in any manner "capable of present estimate and reasonable computation." *Bauman v. Ross*, *supra*, 167 U.S. at 584. If anything, they appear, as a practical matter, almost totally worthless. Accordingly, Penn Central has not received the just compensation required in order for the Landmarks Law's application to Grand Central Terminal to be constitutional, and such application, therefore, cannot be sustained.

#### C. Just Compensation Remains To Be Determined For the Taking That Has Occurred.

It is not necessary for this Court to engage in any estimation or computation of the appropriate level of compensation to which Penn Central is entitled for the taking of its air rights.<sup>35</sup> Because the decision below rested on erroneous constitutional principles, no attempt at valuation was made. It would, therefore, be appropriate here to remand the present case to the state courts of New York for calculation of the just compensation owed to Penn Central.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals of New York,

<sup>35</sup> One commentator has estimated that, as of 1975, the damages "could run upwards of \$15 million." Costonis, *supra*, 75 Colum. L. Rev. at 1076 n.229. As noted in the text, however, the present record does not contain sufficient evidence to make the necessary calculation.

declare the application of the Landmarks Law to the Grand Central Terminal to have been unconstitutional in violation of the Due Process Clause, and remand this case for determination of the appropriate amount of just compensation to be provided to Penn Central.

Respectfully submitted,

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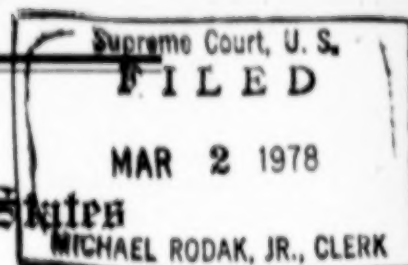
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January, 1978

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977



DOCKET No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET  
REALTY CORPORATION, UGP PROPERTIES, INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**APPELLEES' BRIEF**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

DOCKET No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET  
REALTY CORPORATION, UGP PROPERTIES, INC.,

*Appellants,*

*v.*

THE CITY OF NEW YORK, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**APPELLEES' BRIEF**

**Questions Presented**

1. Does application of New York City Landmarks Law to Grand Central Terminal deprive the owner of due process of law where the owner of the property did not establish that the landmarks designation interfered with continued use of the Terminal or prevented it from earning a reasonable rate of return?

2. Assuming, *arguendo*, that the Landmarks Law, as applied to Grand Central Terminal is an invalid police regulation, are the appellants entitled to damages or compensation for the alleged temporary taking of their property?

### Facts

#### The Instant Lawsuit

##### (1)

On January 22, 1968, after the New York City Landmarks Preservation Commission had designated Grand Central Terminal as a landmark, UGP Properties, Inc. (hereafter UGP) and Penn Central (then New York Central) entered into a lease and sublease arrangement which provides for the "demise" of the transferable development rights over Grand Central Terminal to UGP for the purpose of constructing an office building of approximately 56 stories over the Terminal and, in part, replacing portions of the landmark structure (R1872-1957).\*

On July 18, 1968, the appellants applied to the Landmarks Commission for a certificate of no exterior effect for the so called Breuer I plan (Breuer referring to the architect), a speculative office tower to be cantilevered over Grand Central Terminal. This request was denied on September 20, 1968 (R13a, 25a, 2242, 331-336). On January 20, 1969, the appellants applied to the Landmarks Commission for a certificate of appropriateness either for Breuer I or for a new proposal, Breuer II (2242). Prior

\* In their brief, appellants state that the lease with UGP "guaranteed" the railroad \$3,000,000 a year (App.Br., p. 5). The use of the term guarantee is misleading. UGP was only a corporate shell and there was no assured source of the funds. This payment depended totally on the success of a speculative office building which would have been completed during a period when there was an extraordinary surplus of office space.

References to the Appendix to the Jurisdictional Statement will be preceded by J.S.A. References preceded by J.A. will be to the Joint Appendix. References preceded by R will be to the Record on Appeal in the Court of Appeals.

to the public hearing on the matter, it was discovered that the land on which Breuer II was proposed to be built included land over which the appellants did not have control and that Breuer II would have interfered with certain existing New York City easements (R2242-2243). Consequently appellants prepared new plans, Breuer II Revised, to avoid these problems (R1998-2002, 2252). Both versions of Breuer II involved the destruction of the southern facade of the Terminal.

On August 26, 1969, a certificate of appropriateness was denied for all of the above proposals. In its report denying the certificate, the Landmarks Commission described the public hearings, described the two proposals, and summarized the arguments that had been made (R2242-2255). It also referred to the alternatives that had been proposed for the transfer of development rights to nearby sites (R2247).\*

##### (2)

On October 7, 1969, the appellants initiated this lawsuit seeking declaratory and injunctive relief from the Landmarks Law on its face and as applied, and "compensation" for the alleged temporary taking of their property for the period between its designation as a landmark and the requested judicial invalidation thereof (R7a-21a). A trial was held in which evidence was presented by the parties with respect to appellants' claims of hardship.

At the conclusion of the trial, the trial court, Supreme Court, New York County, found that appellants had proven economic hardship (J.S.A. 70a). The trial court relied primarily on the income and expense statements submitted by the appellants for 1969 and 1971, which showed that for those two years the revenues from the Terminal's concessions were less than the listed expenses (A57a-58a). The trial court did not attribute any value to the transfer

\* The procedures for the transfer of development rights is set forth *infra*, pp. 14-16.

of the unused development rights to other properties owned by Penn Central (J.S.A. 58a).

The Appellate Division of the Supreme Court of the State of New York (two justices dissenting) reversed the Supreme Court and dismissed the complaint (J.S.A. 27a). Reported at 50 AD 2d 265, 377 N.Y.S. 2d 20 (1st Dept., 1975). The Court, citing this Court's decision in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), found that the appellants had not demonstrated that the challenged land use regulation, enacted pursuant to an exercise of the police power, deprived them of all reasonable beneficial use of their property (J.S.A. 26a-27a). With respect to the income and expense statements of 1969 and 1971 submitted by Penn Central, the Appellate Division noted that while those statements had listed the income from the concessions only, they listed railroad operating expenses as well as expenses of the concession business. In addition, no rental value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes although that was the Terminal's principal use (J.S.A. 25a). The Appellate Division also found, *inter alia*, that the appellants had not shown that the unused development rights could not be profitably transferred to other sites (J.S.A. 25a-26a).

In its order, the Appellate Division set forth findings of fact and stated that the findings of fact made by the New York Supreme Court, accompanying the judgment appealed from, which were inconsistent with the findings of the Appellate Division, were reversed (J.S.A. 46a-50a).

The Court of Appeals of the State of New York unanimously affirmed the order of the Appellate Division (J.S.A. 15a). Reported at 42 NY 2d 324, 366 N.E. 2d 1271 (1977). In its opinion, the Court recognized the principle that government regulation would be invalid if it so restricted the use of property as to prevent the owner from realizing a reasonable return on the permitted use (J.S.A. 2a). The Court found that the appellants had not demon-

strated that the subject parcel, as restricted, was incapable of earning a reasonable return (A9a, 13a). The Court stated that designation of a single landmark is not pursuant to a general community plan and thus bears some resemblance to "spot" or discriminatory zoning. But it noted that unlike such zoning, in this case there was a valid purpose (J.S.A. 6a-7a). In addition, it found that Penn Central had received certain benefits. These benefits include tax exemption, subsidies which increased the value of Penn Central's Terminal Area, and valuable transfer development rights (J.S.A. 7a-9a).

The Court then applied the traditional test and found that the appellants had not established that the property is incapable of earning a reasonable rate of return when continued in the use to which it had been devoted and which use remained unaffected by its designation as a landmark (J.S.A. 10a-11a).

The Court, in concluding, stated that Penn Central could present in the New York State Supreme Court any "additional submissions which, in light of this opinion may usefully develop further the factors discussed" (J.S.A. 14a).

#### **Grand Central Terminal.**

In 1869, Cornelius Vanderbilt was authorized by the State Legislature to erect a railroad station on the site of the present Terminal.\* At approximately the same time, Vanderbilt acquired additions to his surrounding railroad property so that he owned practically all of the ground area of the present day complex. The "Grand Central Depot," opened in 1871, was unexceptional and rapidly be-

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\* The description in this section is taken from the report of the Landmarks Commission recommending designation of the Terminal as a landmark and from Grand Central Terminal and Rockefeller Center: *A Historic Critical Estimate of Their Significance*, by FITCH and WAITE, published by the New York State Department of Parks and Recreation, Division for Historic Preservation, 1974, pages 1-8 (hereafter, "Fitch").

came inadequate to handle the expansion of suburban and long distance railroad traffic that occurred at the end of the last century. A dangerous problem of smoke in the train tunnels developed and was solved by electrification.

In addition to eliminating the problem of smoke, electrification opened the way to a complete submergence of all the tracks and a double level track system, which permitted the accommodation of more trains without the purchase of more land. Sub-surface trackage, in turn, permitted the railroad to plan the construction of revenue producing buildings on air rights over the submerged tracks.

From its inception (it was formally opened to the public in 1913) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design. It is not merely a magnificent gateway to the City, but in its system of handsome public spaces for the accommodation of passengers and in its ingenious system of connections between trains, subways and street traffic, it became "the generator of a vast concentration of new urban development" (Fitch, pp. 5-7).

A significant result of the new Terminal project was the emergence of Park Avenue as the most prestigious residential district in the nation. In covering over its trackage between 42nd and 52nd Streets, the railroad upgraded its nearby properties and recouped a large part of its investment (Fitch, p. 6). Included in the properties of the Grand Central Terminal Complex are the Barclay, Biltmore, Commodore, Roosevelt and Waldorf Astoria Hotels, the Yale Club and numerous office buildings along Park Avenue (*id.* at p. 6, J.A. 93). See also, as to the development of the Grand Central Terminal complex, New Haven Inclusion Cases, 399 U.S. 392, 438-440 (1970).\*

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\* In their brief, appellants note that there was a plan in 1911, before the Terminal was completed, to put a twenty story office

(footnote continued on following page)

The architect for the new Terminal, Reed & Stem of St. Paul, Minnesota, selected by nationwide competition, introduced, *inter alia*, the concept of ramps. Later Whitney Warren of Warren and Wetmore took over the architectural design of the Terminal and introduced the fine Beaux Arts facade. Also of note are the scale of the monumental columns, the handsome sculptured details, the main concourse with constellations painted by Paul Helleu, and the monumental statuary group (Mercury, Hercules and Minerva) atop the 42nd Street facade (See photographs J.A. 108-110).\*

As stated in *Urban Design Manhattan*, a report on the Second Regional Plan, by the Regional Plan Association (Viking Press, 1969), at p. 38:

"The Grand Central Terminal complex built between 1903 and 1913 is the conceptual archetype of integrated multilevel development, mixed activities and direct mass transportation access. It has yet to be surpassed \* \* \*."

On August 2, 1967, after a public hearing, the City's Landmarks Preservation Commission proposed designation (later accepted by the Board of Estimate) of the Ter-

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(footnote continued from preceding page)

tower over the Terminal building. This plan was discarded; plans were filed and a certificate of occupancy obtained only for the existing building (R28-29). It is clear from the drawing that the 1911 plan was for a tower of a size and style compatible with that of the Terminal and cannot be compared to the huge slab office towers of over 50 stories proposed by the appellants and rejected by the Landmarks Commission. The appellants did not seek a certificate of appropriateness from the Landmarks Commission to build anything remotely resembling the contours of the 1911 plan.

\* The reproductions of the photographs of Grand Central Terminal in the Joint Appendix do not properly show the building. The actual photographs showing the building are contained in the Record on Appeal in the Court of Appeals on file with this Court. The pictures appear at pages 2232 through 2238.

minal as a landmark (R2240-2241). In its report, it stated, *inter alia* (R2240):

"Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style it represents the best of the French Beaux Arts."

#### Historic Preservation Legislation

In recent years, municipalities throughout the world have become increasingly concerned with the preservation of buildings and sites which have historical, aesthetic or cultural significance. Jacob H. Morrison, *Historic Preservation Law*, 1972 Supplement, pp. i-ii. See also, Rohan, *Zoning and Land Use Controls*, Vol. 2, Section 7.01, at pages 7-2 through 7-9; Ashworth, *Contemporary Developments in British Preservation Law and Practice*, 36 Law § Cont. Prob. 348 (1971). This heightened recognition of the public interest in the value of man's handiwork, particularly in urban areas, has resulted in legislation, at all levels of government, aimed at preserving our historical and cultural heritage.

#### A. Federal legislation on historic preservation.

Since 1966 Congress has passed major new laws furthering historic preservation. For a detailed review of this legislation as of 1971, see Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law § Cont. Prob. 314-328 (1971).

In the National Historic Preservation Act of 1966, Congress found and declared "that the historical and cultural foundations of the nation should be preserved as a living

part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b).

The Act provides for an expanded National Register of Historic Places\* (first provided for in the Historic Sites Act of 1935); state grants-in-aid; grants-in-aid for the National Trust for Historic Preservation, which had been chartered by Congress in 1949; and the establishment of the Advisory Council on Historic Preservation with, *inter alia*, advisory powers respecting protection of National Register properties from undertakings involving federal participation. 16 U.S.C. §§ 470(a)(1), 470(a)(2), 470(g), (j), (i).

The 1969 National Environmental Policy Act (NEPA) makes historic preservation an integral part of our national environmental goals and it provides elaborate procedural machinery for assuring that federal agencies incorporate these goals in their planning. 42 U.S.C. §§ 4321, 4331(b)(4).

In the housing area, HUD has been authorized to provide grant assistance for historic preservation purposes and the Emergency Home Assistance Act provides mortgage loan guarantees where the loans are made "for the purpose of financing the preservation of historic [residential] structures." 12 U.S.C. § 1703; 16 U.S.C. § 470b-1; 42 U.S.C. § 1500-1. See also the Historical and Archeological Preservation Act. 16 U.S.C. § 469.

In the transportation field, Congress again declared it to be national policy that special efforts be made to preserve historic sites and required that the Secretary of Transportation disapprove any project which requires the use of any federal, state or local historic sites or parkland unless there is no feasible and prudent alternative and

\* On January 17, 1975, Grand Central Terminal was listed on the National Register of Historic Places and was designated a national historic landmark.

such project includes "all possible planning to minimize harm" to the site. 49 U.S.C. § 1653(g). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-413 (1971), where this Court, in construing this section as applied to parklands, said that "preservation must be given paramount importance."

The Urban Transportation Act of 1970 requires that planning for mass transportation projects include consideration of their effects on "historical and cultural assets." 49 U.S.C. § 1610. The Amtrak Improvement Act of 1974 seeks to encourage the preservation of passenger railroad terminals of historic significance and architectural quality. It authorizes the Secretary of Transportation to provide financial and other assistance for purposes of promoting the conversion of terminals to "inter-modal" transportation centers and civic and cultural activity centers where the terminal is listed on the National Register and its architectural integrity will be preserved in such a conversion; and it provides that funds for such purposes be expended in the manner most likely to maximize the preservation of terminals of historic significance. 49 U.S.C. § 1653 (i)(1), (2), (3), (4). It also directs that the "National Railroad Passenger Corporation shall give preference to using station facilities that would preserve buildings of historical and architectural significance." 49 U.S.C. § 1653(i)(6).

#### **B. The law on historic preservation in states and localities.**

Since the 1950's, encouraged in part by federal programs, there has been extraordinary growth of state and local legislation for the preservation of landmarks and historic districts, which legislation has been upheld overwhelmingly when tested in the courts. See generally Jacob H. Morrison, *Historic Preservation Law* (1965 and 1972 Supplement). By 1965, 51 cities and every state had enacted some form of historic preservation law; and as of 1976

there were over 500 landmark and historic district commissions throughout the United States. For cases upholding preservation laws, see for example, *Maher v. City of New Orleans*, 371 F. Supp. 653 (E.D. La., 1974), affd. 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976); *Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 AD 2d 376, 288 N.Y.S. 2d 314 (1st Dept., 1968); *First Presbyterian Church of York v. City Council of the City of York*, 25 Pa. C. 154, 360 A. 2d 257 (Commonwealth Ct. of Pa., 1976); *Figarsky v. Historic District Commission of the City of Norwich*, 171 Conn. 198, 368 A. 2d 163 (1976); *Lafayette Park Baptist Church v. Scott*, 553 S.W. 2d 856 (Mo. Ct. of App., 1977); *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E. 2d 282 (1969); *Opinion of the Justices to the Senate*, 333 Mass. 773, 783, 128 N.E. 2d 557, 564 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P. 2d 13 (1964); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A. 2d 232 (1964). See also *City of St. Paul v. Chicago, St. P., M.&O. Ry. Co.*, 413 F. 2d 762 (8th Cir., 1969), cert. den. 396 U.S. 985 (1969); *Benenson v. United States*, 548 F. 2d 939, 949 (Ct. Cl., 1977).

#### **C. Landmarks Preservation in New York City.**

The preservation of landmarks in urban areas is of special importance. In New York City, the need is urgent. The intensity of commercial development in Manhattan's central business district is unique in the world. Unlike other cities, most of the activities in which the New York area plays a major role (finance, insurance, corporate headquarters, communications, foreign trade, wholesaling, apparel, printing, nonprofit organizations, culture and entertainment) are of a kind which locate primarily in the center of the City, *Urban Design Manhattan*. A report by the Regional Plan Association (Viking Press, 1969), pp. 6, 13.

The economic and cultural life of the area is greatly affected by the quality of its physical environment (*id.*,

p. 26). The Regional Plan Association observed (*id.*, p. 17): "We believe that, increasingly the success of the Manhattan Central District will depend on people's ability to move freely and comfortably within it and to enjoy the experience of being there." The importance of Grand Central Terminal as exemplifying the integration of transportation with a variety of mixed activities in a technically sound way has been emphasized by the Regional Plan Association (at pages 38, 40-41, 70-71 *et passim*). As stated by the Association (at p. 110):

"The historic and cultural heritage of the City must be not only saved from demolition but incorporated into future development proposals. This preservation of landmark buildings is imperative to bond the present with the past, thereby forming a continuity which will complement the old while we build for the future."

(1)

In 1956, the State of New York, in accordance with the nationwide trend, passed the Historic Preservation Act, specifically enabling municipalities to provide for the protection of places, buildings and works of art "having a special character or special historical or aesthetic interest or value." Formerly General City Law, § 20 (25a), now McKinney's General Municipal Law, § 96-a.

In 1965, New York City provided for a comprehensive program for landmark preservation by adding Section 2004 to the New York City Charter, and Chapter 8-A (Sections 205-1.0 *et seq.*) to the Administrative Code of the City of New York (J.S.A. 76a-112a). Section 205-1.0 of the Code set forth the purpose and public policy behind

the enactment (J.S.A. 76a). The City Council set forth its findings and declared as a matter of policy that the "protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity required in the interest of the health, prosperity, safety and welfare of the people" (J.S.A. 76a).

Section 2004 of the New York City Charter establishes a Landmarks Preservation Commission composed of eleven members, including "at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor"; also the membership shall include at least one resident of each of the five boroughs."

It is the Commission's task, after public hearing, to designate landmark properties and historic districts. Admin. Code § 207-2.0 (J.S.A. 84a). The Board of Estimate is to approve, disapprove or modify the designation, but, before it does so, the designation must be integrated with the master plan governing land use in the city, i.e., the secretary of the Board "shall refer such designation or amendment thereof to the City Planning Commission, which within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved." Admin. Code § 207-2.0(g)(1) (J.S.A. 85a).

Pursuant to this procedure, the Landmarks Commission has designated more than five hundred landmarks and thirty-one historic districts throughout the City of New York.

Once a landmark is designated, the ordinance requires that those in charge of it keep "it in good repair." Section 207-10.0 (J.S.A. 104a). In addition, the Commission is authorized to regulate construction, reconstruction, al-

teration and demolition on a landmark site. Section 207-4.0 (J.S.A. 88a). Comprehensive procedures are provided where one wishes to make changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be exterior effect, a "certificate of appropriateness." Sections 207-5.0-207-7.0 (J.S.A. 90a-93a). As to taxpaying commercial properties, there is also a procedure for seeking a certificate of appropriateness authorizing demolition on the ground of insufficient return where tax relief or other aid fails to afford the owner a reasonable return on the value of his property for continued use as restricted by law. A similar procedure, providing for different forms of relief, is available to certain tax-exempt properties used for charitable purposes. Section 207-8.0 (J.S.A. 94a).

(2)

Integrated with the Landmarks Law are certain amendments to the New York City Zoning Resolution which permit the transfer of unused development rights over landmark properties located in higher density areas of the City, to other nearby sites. Zoning Resolution, Sections 74-79 to 74-793 (J.S.A. 113a-118a).

The City Planning Commission's report (CP-20253), dated May 1, 1968, in support of the original transfer amendments, stated:

"We anticipate that the proposed amendments will have multiple benefits. The owner of a designated landmark can realize an economic gain by selling his unbuilt, but allowable development rights; the buyer of these rights, in return, can acquire additional floor use he would otherwise not have; the neighborhood, meanwhile can retain an essential amenity, a revitalized landmark, plus new development harmonious with the character of the area \* \* \*."

The original May 1968 transfer provisions authorized the City Planning Commission to grant a special permit for

the transfer of development rights to adjacent sites which included sites adjacent but for streets or street intersections. Also, as originally enacted, the maximum amount of floor area that could be transferred was the basic maximum allowable floor area on the zoning lot in excess of that already developed of all the buildings on the landmark lot (in effect, the total unused development rights), but the permitted floor area increase in any recipient lot was limited to 20% of the floor area otherwise permitted on the recipient site. Common ownership was not necessary.

In December 1969, Sections 74-79 et seq. of the Zoning Resolution were amended to increase the availability of transfers of development rights from landmark properties. In central business districts, the 20% limitation as to recipient lots was removed (J.S.A. 113a). In addition, in such districts, the definition of an "adjacent lot," i.e., a recipient lot, was expanded to mean a lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to a lot occupied by the landmark building. All such lots shall be in the same ownership [as defined in Section 12-10]. Penn Central has a significant number of properties in the Grand Central Terminal area which come within this definition (see Pltfs. Exh. 10 at J.A. 93).

Section 74-79, from its inception in 1968, has required an application for a special permit for transfer to include a site plan of the landmark lot and the adjacent lot, including plans for all development on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. As a condition for such permits, the City Planning Commission must find (a) that the transfer will not unduly increase the bulk of any new development, density of population or intensity of use in any block, to the detriment of nearby blocks and (b) "that the program for continuing maintenance will result in the

preservation of the landmark" 74-792 (J.S.A. 115a). The City Planning Commission is authorized to prescribe, in order to ensure that the transfer is in accordance with the plan, "appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area" (J.S.A. 117a).

### Summary of Argument

#### (1)

The appellants, without any analysis, have argued that the City of New York, in applying the Landmarks Law to Grand Central Terminal, has taken their property and must pay the appellants compensation because they have been denied the most profitable use of their property. It is our position that the designation of Grand Central Terminal as a landmark was a proper exercise of the police power. Since the appellants did not establish that the property, as restricted, was not economically viable, the complaint was properly dismissed.

This Court has noted that, in the exercise of the police power, a state has broad power to respond to emerging economic and social problems. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The power in restricting land use has been extended to legislation for aesthetic and other similar purposes having to do with the quality of life. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 5-6 (1974).

Where the land use regulation is within the police power, the validity of the regulation will depend on an examination and balancing of three elements: the importance of the regulation to the public good, the reasonableness with which the regulation attempts to achieve that good and whether the restriction on the parcel renders it economically unviable. These three considerations were set forth by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593-594 (1962).

With respect to the first consideration, as we stated above, land use regulation for aesthetic and other similar purposes, is included within the police power. The landmarks law satisfies the second element. It is reasonable in light of the purpose to be achieved. The only method to preserve landmarks is to prohibit their owners from destroying them without permission.

The remaining criteria is the impact on the particular parcel. On this consideration, the plaintiff, to succeed in attacking a land use regulation, must demonstrate that the regulation deprives him of all reasonable use of the property. See *Goldblatt, supra*, 369 U.S. 590.

This standard has been applied to owners of property in historic districts who attack land use regulations prohibiting the destruction of their property within the district. See *Maher v. New Orleans*, 516 F. 2d 1051, 1066 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976).

The appellants do not dispute the application of this test to buildings in historic districts. They object to the application of this test to their building on the ground that it is not part of a district. It is our position that appellants' argument misapprehends the purpose of landmarks legislation in New York City. In New York City, the landmark scheme directly relates to all aspects of life in the City and all property owners participate in the benefits gained. Individual designations are part of a comprehensive scheme to preserve historic properties throughout the entire City. The Landmarks Commission has designated over 500 buildings and thirty-one historic districts. After a building is designated, the designation must be submitted to the City Planning Commission which must submit a report to the Board of Estimate with respect to the relation of such designation to the master plan and the zoning resolution. After receipt of the report the Board of Estimate may approve, disapprove or modify such designation. New York City Administrative Code § 207-2.0(g)(1) (J.S.A. 85a).

This overall scheme distinguishes landmarks designation from a zoning case involving discriminatory or "spot" zoning.

Appellants' property is being treated similarly to any other owner of property which has been designated as a landmark. Appellants would be entitled to relief if they could establish that the property was not economically viable. At trial Penn Central argued that it had lost money in running the Terminal. In support of its position, Penn Central submitted a statement of Revenues and Costs for Grand Central Terminal for 1969 and 1972. In these statements Penn Central did not include the value of owner-occupied space in the Terminal used by the Railroad for railroad purposes (the appellants do not dispute Penn Central's need for a Terminal), offices, storage and employee amenities. The revenues included only rents from the concessions. In contrast, in the costs portion of the statements the appellants included the expenses of the entire Terminal, not distinguishing between those expenses incident to real estate operations and those incident to railroad operations. In addition, the appellants did not attribute any value to the transfer development rights. At trial, the evidence showed that the air rights had substantial value.

The Appellate Division, in reversing the Supreme Court, reversed the trial court's findings of fact and, in its own findings, found that the "Statement of Revenue and Costs" had improperly failed to impute rental value and had improperly attributed railroad operating expenses to its real estate operations (J.S.A. 49a-50a). The Appellate Division also found that the appellants did not establish that the air rights could not have been profitably transferred to other sites (J.S.A. 49a). These findings were confirmed by the Court of Appeals.

The appellants' entire brief is devoted to the decision of the Court of Appeals. It urges that the New York

Court of Appeals established new concepts in eminent domain. The Court of Appeals specifically rejected the application of principles applicable to a taking in eminent domain to this case (J.S.A. 5a). The Court of Appeals, in its opinion, assumed that the traditional police power test would apply to the designation of an individual landmark. The Court stated that, unlike buildings in historic districts, individual landmarks are not part of a comprehensive plan and the designation imposes burdens on the owner without benefits. The Court then noted that in a particular case there may be sufficient benefits to bring such a restriction within the proper exercise of the police power. Those benefits here included the tax exemption, the valuable transfer development rights, and that portion of the value of the Terminal which has been created by public contribution. The Court reasoned that these benefits justified applying the police power test applicable to all land use regulations. The Court, in applying the test, concluded that the appellants had failed to sustain their burden of proof.

The Court considered the special benefits because it did not see individual designations as being pursuant to a comprehensive plan. It is our position that on this point, the Court erred. As we noted above, the designation of each individual landmark is part of a comprehensive plan to preserve all historic buildings throughout the City which in turn is integrated into the general community plan.

Even if the single designation cannot be considered as part of a general plan, the Court of Appeals only considered the special benefits to Grand Central Terminal to enable it to apply the traditional test. Those benefits place Grand Central in the same position as an owner of a property in an historic district. If he can show economic hardship, he is entitled to obtain relief. In this case, the New York State appellate courts, in findings not contested by appellant, indicated that the appellants had failed to meet that burden.

## (2)

Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are not entitled to damages. There can be no cause of action for an inverse condemnation. The Landmarks Law in this case was enacted pursuant to the police power. Condemnation of Grand Central Terminal, for public ownership, would require compliance with the procedures set forth in the New York City Administrative Code, Section B15-1.0 *et seq.* Nor has there been a de facto taking. There has been no physical invasion of the land or other official action interfering with the appellants' use of its property sufficient to constitute a taking.

The appellants do not have a claim for damages. The invalidation of a police power regulation does not entitle the property owner to damages. See, e.g., *Velting v. Ramsey*, 94 N.J. Sup. 459, 228 A. 2d 873, 874 (1976). Municipalities must be free to exercise the police power. To require municipalities to be liable in damages for an improper exercise of the police power, would impair their power to perform a vital governmental function.

### ARGUMENT

- I The complaint was properly dismissed. The New York City Landmarks Law, as applied to Grand Central Terminal, did not deprive the owner of due process. The owner failed to show that the landmark designation interfered with continued use of the Terminal or prevented it from earning a reasonable rate of return.**

## (1)

Appellants in their brief specifically concede that a landmarks law is a proper subject for the exercise of the police power (App. Br., pp. 12, 22-23). The appellants contend, however, that in applying a landmarks law to

Grand Central Terminal, the appellees should be required to pay them compensation because the appellants have been denied the most profitable use of their property. This position that there was a taking because of a de facto condemnation is urged upon this Court without any attempt by appellants to show that the subject property as restricted is not economically viable. In support of that argument, appellants divide the landmark parcel into two parts, the Terminal itself and the air rights over the Terminal (App. Br., pp. 9, 11, 24, 26). Their argument appears to be that the City, in the application of the Landmarks Law, has "taken" the air rights above the Terminal, a separate and distinct property, without paying just compensation. This attempt to divide the regulated property into two distinct parts is contrary to traditional property law. The right to develop above one's property is one of the bundle of rights which inhere in all property ownership. It is noteworthy that in traditional zoning and historic district regulation, the very same "taking" would occur. In those instances, it has been held that there is no taking. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976). For, in all land use regulation, there is not a separate calculation on the reasonableness of the return on each right in the bundle, but instead an assessment of the reasonableness of the total return on the property as a whole. Thus, appellants' statement on page 24 that the "economic return to Penn Central from the Terminal" is "immaterial in deciding whether or not there has been a taking of the Terminal air rights by operation of the Landmarks Law" is incorrect.

It is our position that appellants have improperly confused the principles of eminent domain, which they incorrectly urge were applied by the New York Court of Appeals, with principles governing a lawful exercise of the police power. As set forth below, the designation of

Grand Central Terminal was a proper exercise of the police power. Since appellants failed to establish at a trial that the property, as restricted, was not economically viable, dismissal of the complaint was proper pursuant to traditional standards of land use regulation.

## (2)

This Court has established a substantial body of precedent setting forth the appropriate criteria for determining whether a land use regulation is a valid exercise of the police power. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court, in sustaining a zoning ordinance, stated that it would not find such ordinance to be outside the scope of the police power unless its provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at p. 395. In its opinion, this Court further recognized that a State legislature has flexible power to respond to unique economic and cultural problems, particularly those arising from the vast changes in the extent and the complexity of the problems of modern city life. 272 U.S. at pp. 386-387. See also, *Young v. American Mini Theatres*, 427 U.S. 50, 71-72 (1970); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927). The police power, in a land use context, has been extended to the promotion of general community development, which includes legislation for aesthetics and other purposes affecting the quality of life. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 5-6 (1974). See also *Berman v. Parker*, 348 U.S. 26, 31-33 (1954).

Where the land use regulation is within the police power, the burden is on plaintiff to establish that the line separating valid regulation from confiscation has been breached. In meeting this burden, it is insufficient to show that the regulation has deprived the property owner of the most profitable use of his property. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592-593 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915). See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-416 (1922).

The cases cited above indicate that a determination of whether the land use regulation is valid will depend on an examination and balancing of three elements: the importance of the regulation to the public good; the reasonableness with which the regulation attempts to achieve that good; and how substantially the regulation affects the economic viability of the particular parcel.

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-595 (1962), this Court set forth these considerations as providing the test of constitutionality of an ordinance regulating land use by prohibiting excavation below the water table. Preliminarily, the Court found that although the ordinance completely prohibited the continued operation of the plaintiffs' sand and gravel mine and deprived the property of its most beneficial use, this did not make it unconstitutional (pp. 592-593, 596). Nor did constitutionality hinge on whether the use prohibited was a common law nuisance (p. 593). In applying the test as to the importance of the regulation for the general welfare of the community, this Court concluded that the plaintiff had failed to meet its burden of presenting evidence sufficient to overcome the presumption of constitutionality. 369 U.S. at p. 596.

As we noted above, citing cases, land use regulation for aesthetic purposes has been recognized by this Court as of vital importance to the welfare of the community and within the police power of state legislatures. More than this, as we have shown earlier, at all levels of government there has been an increasing awareness of the need to preserve our cultural heritage, represented in part by our landmark buildings and historic districts. It has been recognized that such preservation is directly related to the economic and cultural vitality of the City.

The second consideration is whether the restrictions are reasonable in light of the public purpose to be achieved. In *Goldblatt v. Town of Hempstead*, *supra*, 369 U.S. at p. 595,

this Court referred to "the availability and effectiveness of other less drastic protective steps" as a prime test for determining the reasonableness of the regulation. Here, since the public purpose is to preserve landmarks, preservation can only be accomplished by requiring that the landmarks not be destroyed or altered without permission.

The remaining criterion is the impact of the regulation upon the parcel's economic viability. Under the decisions of this Court, *Goldblatt, supra*, 369 U.S. 590, *Hadacheck, supra*, 239 U.S. 394 and *Pennsylvania Coal, supra*, 260 U.S. 393, the plaintiff, to succeed in attacking a Landmarks Law as an unconstitutional deprivation of property, must demonstrate that the law, as applied to the subject parcel, deprives him of all reasonable economic use of the property.

This standard was applied in *Maher v. New Orleans*, 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976), which involved the power of the City of New Orleans to enact an architectural control ordinance applicable to the historic French Quarter of New Orleans. In upholding the ordinance, the Court of Appeals found that the plaintiff was not entitled to relief because he could not demonstrate that the subject property, as restricted, could not yield a reasonable rate of return. 516 F. 2d at p. 1066.

See *First Presbyterian Church of York v. City Council of the City of New York*, 25 Pa. Co. 154, 360 A. 2d 257, 260-261 (Comm. Ct. of Pa., 1976); *Figarsky v. Historic District Commission of the City of Norwich*, 171 Conn. 198, 368 A. 2d 163 (1976), where the Courts, in applying similar tests, upheld denial of demolition permits. See also, *Lafayette Park Baptist Church v. Scott*, 553 S.W. 2d 856, 862-863 (Mo. Ct. of App. 1977).

As we will show *infra*, pp. 27-33, the state appellate courts properly found in the instant case that the appellants had not demonstrated that the Terminal, as restricted by the Landmarks Law, is incapable of earning a reasonable rate

of return upon its value for the use to which it has been continuously devoted, and which use is unaffected by designation as a landmark.

### (3)

It is noteworthy that appellants do not dispute the application of the three-fold test, including the requirement that a plaintiff demonstrate that the property, as restricted, is not economically viable, to individual parcels located within designated historic districts (App. Br., pp. 22-23). They object to the use of the test only when an individual building, outside of a district, is designated as a landmark. In such a case, appellants contend that a state should only be allowed to restrict the use of property if it pays compensation to the owner. This attempt to treat buildings of unique historic, cultural or aesthetic character differently, depending on whether they are sufficiently contiguous to be classified as a district, or sufficiently separated to require individual designations for a city-wide classification, does no more than place form over substance and represents a misapprehension of the purpose of landmarks legislation.

As we discussed in an earlier part of our brief, landmarks preservation is necessary to the general welfare of the people, particularly in New York City where the economic and cultural life of a densely populated metropolis is strongly affected by the quality of its physical environment. The more successful a landmarks law is in preserving the urban environment as an attractive place to live, the more it will contribute to the preservation of the City's quality as a center of communication, finance, and transportation. The landmarks scheme directly relates to all aspects of life in the City and all property owners participate in the benefits gained.

Appellants' parcel of land has not been "singled out" for discriminatory regulation. The individual designations under the New York City Law are part of a general com-

munity plan to preserve historic properties throughout the entire city. The landmarks legislation contemplates that designations will continue to be made (Section 207-2.0, subd. i, J.S.A. 86a). Each designation must be forwarded to the City Planning Commission, which must submit a report to the Board of Estimate with respect to the relation of such designation to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved. New York City Admin. Code § 207-2.0(g)(1) (J.S.A. 85a). As a result, the landmarks preservation program is part of a general land use plan for the entire city. The law sets forth specific criteria which must be met for designation. The Landmarks Commission has designated over 500 buildings and thirty-one historic districts throughout the five boroughs of New York City, all of them contributing to the vitality of the city in which appellants own property. If a landowner believes that the designation is improper, he may challenge the designation whether or not the property is in an historic district and will be entitled to relief if he can show that the property is not economically viable or that the designation is unreasonable.

It may well be that the burdens of landmarks regulation are not equal and the benefits are not exactly proportionate to the burdens, but that is also true of all land use regulation, including zoning, which does not impose uniform restraints and reciprocal benefits. In a large number of land use regulation cases in which the owner of the restricted property unsuccessfully challenged the regulation, it was recognized that the burdens to the owner were greater than the benefits. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (zoning); *Queenside Hills Realty v. Saxl*, 328 U.S. 80 (1946) (requirement of a sprinkler system); *Maher v. The City of New Orleans*, 516 F. 2d 1051 (5th Cir. 1975) (historic district regulation); *Construction Ind. Assn., Sonoma Cty. v. City of Petaluma*, 522 F.2d 897 (9th Cir., 1975), cert. den. 424 U.S. 934 (1976) (moratorium on residential development) and *Cromwell v.*

*Ferrier*, 19 N Y 2d 263, 225 N. E. 2d 749 (1967) (billboards).

The designation of an individual landmark is not analogous to spot zoning. Spot zoning is unplanned land use regulation which results in an arbitrary or unreasonable devotion of a small area so zoned or rezoned to uses inconsistent with those to which the rest of the district is restricted. See *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E. 2d 731, 734 (1951); *City & County of Denver v. Denver Buick*, 141 Col. 121, 347 P. 2d 919 (Col. 1959); *Rathkopf, The Law of Zoning & Planning* §§ 26.01-26.03. It is the overall scheme of the Landmarks Law which distinguishes this case from cases involving spot zoning. The designation of Grand Central Terminal is pursuant to general plan. It is related to the preservation of other structures which, taken all together, maintain the attractive quality of the City. It is not unreasonable to distinguish historic properties from the unhistoric. This distinction, in which pursuant to a general plan historic buildings are treated differently from buildings which are not landmarks, bears a rational relationship to a legitimate state interest. See *City of New Orleans v. Dukes*, 427 U.S. 297 303-305 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Construction Ind. Assn., Sonoma Cty. v. City of Petaluma*, 522 F. 2d 897, 906 (9th Cir., 1975) cert. den. 424 U.S. 934 (1976).

In sum, appellants' property is being regulated pursuant to the same legislative scheme affecting hundreds of other landmark parcels in this City. As indicated above, appellants were entitled to avoid regulation by establishing that the property, as restricted, was not economically viable. In this case, the state courts found that appellants failed to meet that burden.

#### (4)

At the trial, Penn Central argued that it was suffering an operating loss in running the Terminal. The basis for

Penn Central's claim is a "Statement of Revenues and costs" for Grand Central Terminal for 1971 and a similar statement for 1969 (J.A. 100-104). These statements were prepared specifically for this litigation (J.A. 61, 62, 65). In these statements, "Grand Central Terminal" includes the station building and the subsurface area, including platforms (J.A. 61).

The state appellate courts found that the first significant legal error in the statements occurred in Penn Central's treatment of "Revenues." It is fundamental that the rental value of an improvement must include the imputed value of the owner-occupied space. See *Matter of Seagram & Sons v. Tax Comm.*, 14 NY 2d 314, 200 N.E. 2d 447 (1964). But Penn Central included under "Revenues" only the rents received from the Terminal's commercial tenants and concessionaires (J.A. 61). Thus the total revenue figure of \$3,174,257 includes rentals for what is only a portion of the Terminal's total space. It does not include any rental value for those portions of the Terminal used by the railroad for offices, storage and employee amenities (J.A. 64). More important, the "Revenues" figure does not include any rental value for the vast bulk of space in the Terminal which is used for railroad purposes.\* Where rental value for a building's principal use is altogether omitted, such "study" as to its economic viability is obviously of little probative value. The reasonable rental value of the space used by a railroad in passenger business as a terminal cannot properly be deleted from any meaningful analysis of the property's capacity to yield a reasonable return.

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\* Appellants in their brief suggest that the Terminal is physically deteriorating (App. Br., p. 1). To the contrary, any visitor to the station would be aware that the physical structure of the Terminal has been substantially upgraded in recent years. The Terminal serves thirty thousand commuters daily with additional hundreds of thousands of persons, who use the City's subway system, passing through the Terminal, *Pitch*, p. 6.

The magnitude and significance of the error made by the appellants in the New York Supreme Court can be readily seen. The space devoted to railroad use, and leased to a governmental agency, which operates the service is vast. It includes the main concourse; the tracks and platforms; connecting areas on the main concourse level and on the various subsurface levels; the lower level concourse; the areas used for the sale of tickets; the areas used by the various workers involved in the Terminal (e.g. the station master and his staff). All of this enormous space, containing massive railroad facilities and improvements, was neglected by Penn Central, as if it did not exist. It may be noted that the assessed valuation of the transportation portions of the Terminal is approximately double the assessed valuation of those portions of the Terminal devoted to commercial and concession use (J.A. 91), and rents from commercial and concession use exceeded three million dollars a year (J.A. 102).

With respect to the appellants' list of "Costs of Maintenance and Operation," the appellants failed to distinguish between expenses incident to real estate operations and those incident to railroad operations. Thus although "Revenues" were limited to values generated by the commercial and concession use of the Terminal, the "cost" items were not so limited (J.A. 64-65, 66, 100-104).

Appellants attributed to the Terminal building not just those expenses which could be considered expenses of maintaining the real estate, but all of their expenses in operating a railroad terminal. Mr. Milano, regional controller of the metropolitan region of Penn Central, who testified about the expenses listed on the "Statement of Revenues and Costs," admitted that the \$1,141,679 listed for "maintenance, repairs and service plant operation," the largest single cost item, referred to costs of the entire terminal operation, as did the \$632,753 listed for "cleaning," the \$438,566 for "policing" and the \$69,485 for "other direct costs" (rubbish removal *et alia*) (*id.*). This

would also be true of the "materials and supplies" (\$69,692) used in "maintenance," the "utilities" (\$660,710), and the "supervision of maintenance" (\$205,029).

In addition, "track cleaning" (\$57,188), "supervision" of track cleaning (\$5,816), and general administrative expenses (\$350,301) (which refer to such things as the salaries of the general manager of the railroad and his staff and accounting costs) are not properly attributable in any degree to operations of the Terminal alone. They are expenses of the entire business (J.A. 64-65, R945, 947-948).

Of the total expenses of \$5,076,724, the only cost that is clearly attributable solely to the real estate and not in whole or in part to the business is the \$598,494 for "real estate taxes." Other items of expense such as "Gross earning taxes", "track cleaning", "supervision of track cleaning," "depreciation" and "general administrative expenses" of the railroad are not attributable in any part to the costs of running the building. These total \$812,805. As for all the other expenses for maintenance and so on, appellants can properly list as expenses only that portion which is attributable to the operation of the real estate and not to the operations of their business. As with their error in computing rentals, the record is completely inaccurate. They made no attempt whatever to make the necessary allocation. The appellate courts properly found that there was a total failure of proof in the appellants' attempt to establish economic hardship based on the income and expense statements.

In addition, appellants did not establish that the unused transfer rights over the Terminal could not have profitably transferred to other sites. To the contrary, at the trial it was shown that, in appropriate cases, transfer rights have substantial value. Thirty thousand square feet of development rights had been transferred from Amster Yard, a landmark in mid-town Manhattan to a site on the same block. Such a transfer permits construction of a larger

building on the receiving site. The transfer was effected at a price of approximately \$494,000 (R1206-1209).

Both Penn Central and UGP had acknowledged by their actions that the transfer rights from the landmark site to an adjacent site constituted a valuable asset, which could be the subject to a sale.

In 1969 UGP had its architect, Marcel Breuer, prepare schematic plans for an office building on the site of the Biltmore Hotel which would be of equivalent size to the proposed towers over Grand Central Terminal. The plans for such a building had reached a stage "comparable to" the plans for the proposed towers (J.A. 36-37). The Biltmore Hotel was to be demolished, approximately 1.3 million square feet of development rights transferred to the site and a building of 2.1 million square feet was to be constructed (J.A. 37, 73-74). The remaining unused development rights would have been available to Penn Central to transfer to other sites.

The 1969 amendments to the Zoning Resolution were expressly intended to expand the number of sites that could receive transfers of development rights from the Grand Central Terminal site (J.A. 68-69). Although there was disagreement in the testimony as to whether the developer had agreed to apply for a transfer once the amendment was enacted (as testified to by Jacquelin Robertson, the Director of the Office of Midtown Planning and Development, J.A. 73-74) or agreed only to seriously consider such an application (as testified to by Murray Drabkin of UGP (J.A. 38-39), it is undisputed that virtually all of the details as to such application had been worked out with the City Planning Commission and that the Commission was ready to proceed with the required public hearing (J.A. 70-71, 75-76, 77).

The evidence also indicated that, in late 1970 and 1971, UGP and Penn Central negotiated for a lease on the Biltmore site and a transfer of air rights from the land-

mark parcel to the Biltmore site. UGP's offer of \$3.8 million in annual rent was turned down by Penn Central which was asking for \$5 million (J.A. 33-35). That the economic value of the air rights above the Terminal were being preserved, is thus clearly apparent from the record proof. When Penn Central offered its midtown properties for sale in 1971, UGP placed two alternative bids, one for the Grand Central Terminal air rights together with the fee in the Biltmore site and one for the air rights plus the fee in the Roosevelt Hotel site. It offered \$11.7 million for the Biltmore, plus \$3.5 million for the air rights (J.A. 47-49). Although these bids were rejected by Penn Central, they evidence UGP's view of the economic feasibility of both proposals.\*

In their brief, without referring to any evidence submitted at the trial, the appellants argue that the value of the air rights is minimal because of the procedures necessary to obtain approval of the transfer (App. Br., pp. 40-41). A transfer of development rights is required to be approved by the New York City Planning Commission and the Board of Estimate. In this case the City Planning Commission, which, in cooperation with the appellants, had developed a plan to amend the Zoning Resolution to benefit Grand Central Terminal, and the Board of Estimate were prepared to proceed expeditiously. At no time in the course of trial or an appeal in the state courts, did the appellants seriously question that, in fact, such approval was almost certainly forthcoming.

The evidence offered by the appellants in support of their argument of economic hardship, relating to the air rights and the statement of revenues and expenses was carefully reviewed by the State appellate courts. The Appellate Division, in its order dismissing the complaint found that

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\* Interest in the development rights was also expressed by two major real estate developers in New York City, Harry Helmsley and Goldman-DiLorenzo (J.A. 77, 86-87).

the appellants had failed to show that the unused development rights could not have been profitably transferred to one or more nearby sites (J.S.A. 49a). In presenting their proof of alleged hardship the appellants had ascribed no value to the development rights (*id.*). The Appellate Division also found that the statement of revenues and expenses failed to impute any rental value for the part of the Terminal used for railroad purposes and that the statement improperly attributed a considerable amount of their operating expenses to real estate operations (J.S.A. 49a-50a).<sup>\*</sup> These findings of fact were affirmed by the New York Court of Appeals.

### (5)

The appellants' entire brief is devoted to an analysis of the decision of the New York Court of Appeals which it characterizes as having fashioned special rules in permitting the City to designate Grand Central Terminal without the payment of just compensation (see particularly, App. Br., pp. 9, 20-23). The appellants' brief assumes that this is a "taking" case involving the principles of eminent domain and that the only issue is whether the Court of Appeals, instead of awarding the appellants just compensation, approved of a lesser standard of fair compensation in cases involving historic buildings. There is nothing in the opinion of the Court of Appeals to support

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\* In their brief appellants (p. 8, fn. 7) state that, in the New York courts, Penn Central presented substantial evidence that it could not earn, either before or after the designation, a reasonable rate of return. As we discussed in the main text, this evidence was found to be insufficient by the Appellate Division and the New York Court of Appeals. The findings of the trial court were reversed (J.S.A. 45a-55a).

Throughout the amicus brief of the Real Estate Board of New York, Inc. there are statements of "fact" relating to the condition of the Terminal and the burden on the appellants to operate the Terminal (Br., pp. 27, 39). These assertions were also rejected by the Appellate Division and the Court of Appeals.

such a theory. To the contrary the Court of Appeals stated that the principles of eminent domain are not applicable to this case (J.S.A. 5a).\*

In his opinion, Judge Breitel presumed that the traditional police power test would apply to the designation of an individual landmark (J.S.A. 5a).\*\* At the beginning of his opinion, Judge Breitel stated that the landmarks designation of Grand Central Terminal was not zoning because zoning imposes both benefits and burdens on an owner and is affected pursuant to a general plan (J.S.A. 4a). Judge Breitel concluded that landmarks designation of an individual parcel is not designed to "further a general community plan" and imposes burdens on the owner without comparable benefits, even though it has an acceptable purpose distinguishing it from discriminatory or spot zoning (J.S.A. 5a-6a).

Then Judge Breitel noted that, in a particular case, there may be benefits to a landmark site sufficient to keep it within the ambit of the police power (J.S.A. 5a-6a). These benefits included the tax exemption (pltfs.' Exh. 8 at J.S.A. 91); the valuable transfer development rights; the

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\* For example, the appellants state that the Court of Appeals (citing its opinion at pp. 2-3) erred in holding that, in landmark cases, "compensation need not be paid for such portion of the value of air rights that the court asserted to be attributable to the efforts of 'organized society' or the 'social complex' in which the Terminal is located (App. Br., pp. 16-17). A reading of the pages cited by the appellants indicates that the Court was discussing these factors in the context of the police power and the appropriate test is reasonable rate of return.

\*\* Our interpretation of the opinion of the Court of Appeals in the instant case has been confirmed by the New York Court of Appeals in *Modjeska Sign Studios, Inc. v. Berle*, — N Y 2d —, opinion dated December 21, 1977. In commenting on its decision in *Penn Central*, the Court noted that the landmark regulation there "did not deprive the property owner of the ability to use the regulated land in a manner which would ensure a reasonable return on its investment" (Opin., p. 5).

value of the Terminal which has been created by the public contribution, and the enormous value of the land owned by Penn Central in the area surrounding Grand Central Terminal (See pltfs.' Exh. 10, at J.S.A. 93).

The Court reasoned that these benefits justify applying to Grand Central Terminal the traditional police power test applicable to regulation of land use. Applying the traditional test, the Court of Appeals properly concluded that the appellants failed to show that the property, as restricted, was incapable of earning a reasonable rate of return.\*

This is precisely the test that we discussed in subdivision 2 of our argument. The Court of Appeals went through an extra step where it considered the tax exemption, etc., because it did not see site-by-site landmark designation as being pursuant to a general community plan. We think that in this, the Court erred. As we discussed above, *supra*, pp. 25-27, the designation of individual landmarks is part of a comprehensive plan to preserve historic buildings throughout the City which plan is, in turn, integrated into the general land use plan for the entire City. The Court of Appeals' analysis could, at best, only be applicable to a municipality which has no landmarks legislation and passes a law to preserve an historic building in private ownership.

But even assuming that a single designation cannot be considered as part of a general community plan, the Court of Appeals only referred to the particular benefits to Grand Central Terminal to apply the traditional test applicable

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\* In their brief in discussing "anticipated economic return", the appellants, citing the opinion of the Court of Appeals, group the Terminal with "other nearby buildings" (p. 24). This is a misrepresentation of the opinion of the Court of Appeals. The Court of Appeals only referred to the increased value of the "nearby buildings" for the purpose of indicating a factor to be considered in determining whether or not the landmark parcel, as restricted, was economically viable (J.S.A. 13a-14a).

to a land use regulation enacted pursuant to the police power. These particular benefits place the owner of property in the same position as an owner of property in an historic district or an owner of property subject to a zoning resolution. If he can show economic hardship, he will be entitled to relief. In this case, the appellants failed to meet that burden.

(6)

We will not discuss each of the cases cited by the appellants in their brief. Those cases, including *Griggs v. Allegheny County*, 369 U.S. 84 (1962) and *United States v. Causby*, 328 U.S. 256 (1946), involve the application of the principles of eminent domain where there has been a physical invasion of the owner's land or some other governmental action which interfered with the existing use. In the instant case, the property, as restricted, is continuing to function as a terminal. The appellants have used these cases in support of their argument that the New York Court of Appeals found the instant designation to be a taking, but incorrectly denied just compensation therefor. As we discussed above, *supra*, p. 21, this argument is based on the improper assumption that the landmark parcel consists of two distinct properties, the Terminal and the air rights above the Terminal. This taking argument is not supported by the opinion of the Court of Appeals. The Court of Appeals stated that there had been no taking and found that the principles of eminent domain were not applicable to the case (J.S.A. 5a). The appropriate issue in this case is whether the land use regulation has made the property economically unviable. We have shown that the appellants did not sustain their burden of proof on this issue.

**II Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are in no event entitled to damages or compensation. There has been no legally authorized, or de facto, exercise of the power of eminent domain. The invalidation of a police power regulation does not entitle the property owner to a money judgment.**

Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are not entitled to damages or compensation.

The issue of an award of compensation for an inverse condemnation was raised in *French Inv. Co. v. City of New York*, 39 NY 2d 587, 350 N.E. 2d 381 (1976). In *French*, the Court of Appeals held that an amendment to the zoning resolution which rezoned the parks in Tudor City in Manhattan was unconstitutional but that this did not constitute a compensable taking. The Court of Appeals however, on the ground that the issue was not properly raised, refused to determine whether the plaintiff would be entitled to damages flowing from an illegal exercise of discretionary governmental power. 39 NY 2d at p. 599, 350 N.E. 2d at p. 388. The plaintiffs sought review of the denial of an award of compensation in this Court. The appeal was dismissed. 429 U.S. 990 (1976).

In *Mailman Development Corporation v. City of Hollywood*, 286 So. 2d 614 (Fla. App., 1974), cert. den. 293 So. 2d 713, cert. den. 419 U.S. 844, the State Court upheld the dismissal of one count of a complaint which pleaded a taking by reason of the confiscatory effect of a zoning change challenged in another count of the same complaint.

In this case, there could be no cause of action for an inverse taking. The provisions of the Landmarks Law at issue here were enacted pursuant to the police power. There has been no attempt to appropriate Grand Central

Terminal to public ownership. The challenged actions of the Landmarks Commission, in designating the Terminal a landmark and in denying the appellants a certificate of no exterior effect or a certificate of appropriateness, could not legally have effected a condemnation justifying an award of compensation. The authority to exercise the power of eminent domain requires capital budget action under New York City Charter, Chapter 9. The procedures for a condemnation in New York City are set forth in the New York City Administrative Code, Section B15-1.0 et seq. See also New York City Charter, Section 382. Compare 207-8.0 (g)(2) of the Administrative Code (J.S.A. 100a), which specifically provides for condemnation with respect to landmarks in certain instances not applicable here. Even then, it is not the Landmarks Commission which is authorized to condemn. The Commission is authorized only to make recommendations to the Mayor; then the City has the option of instituting condemnation proceedings.

Nor can it be said to be a de facto taking. There has been no physical invasion of the land, ouster of the owner, or official action interfering with the appellants' use of its property sufficient to constitute a de facto taking. Cf. *City of Buffalo v. Clement Co.*, 28 NY 2d 241, 255-257, 269 N.E. 2d 895, 903-904 (1971); *Matter of Charles v. Diamond*, 41 NY 2d 318, 329, 360 N.E. 2d 1295, 1303 (1977).

Nor do the appellants have a cause of action for damages. A statement on the applicable principle was set forth in *Velting v. Ramsey*, 94 N.J. Sup. 459, 228 A. 2d 873 (1967). In *Velting*, plaintiff brought an action for damages for the loss of the use of property following the invalidation of successive zoning amendments. The municipality's defense was good faith action in reliance upon opinions of planning experts. In awarding summary judgment to the municipality, the Court stated (228 A. 2d at 874):

"The adoption of these amendments to the zoning ordinance by the governing body represents the exercise of a discretionary governmental function.

No cause of action against the municipality can be grounded on the alleged invalidity of such an official legislative determination. *Visidor Corp. v. Cliffside Park*, 48 N.J. 214, 225 A. 2d 105 (1966) \* \* \*.

The power of a municipality to adopt zoning regulations pursuant to statutory authority is an essential aspect of the police power. The governing body must be free to exercise that power in good faith to amend or alter its zoning regulations when it determines the public interest so requires, to hold otherwise would saddle municipalities with oppressive financial burdens and litigation which would seriously impair if not nullify, their power to perform a vital governmental function. See *Visidor Corp. v. Cliffside Park*, supra."\*

To similar effect is *Matter of Charles v. Diamond*, 41 NY 2d 318, 331-332, 360 N.E. 2d 1295, 1304-1305 (1977); *Superior Uptown Inc. v. City of Cleveland*, 39 Ohio St. 2d 36, 313 N.E. 2d 820 (1974); *Mailman Development Corporation v. City of Hollywood*, 286 So. 2d 614, 615 (Dist. Ct. of App., Fla., 1974), cert. den. 293 So. 2d 717, cert. den. 419 U.S. 844 (1969); *HFH, Ltd. v. Superior Court of Los Angeles County*, 125 Cal. Repr. 365, 542 P. 2d 237, 242-243 (1975), cert. den. 425 U.S. 904 (1976); *Visidor Corp. v. Cliffside Park*, 48 N.J. 214, 225 A.2d 105 (1966), cert. den. 386 U.S. 972 (1966).

If a contrary rule were established permitting an award of damages for an invalid police power regulation, public officials would be reluctant to enact innovative but untested legislation. The result would be a substantial disruption in the functions of municipalities with respect to projects involving discretionary action such as the building of highways, regulation of noise, zoning and landmarks preservation.

**CONCLUSION**

**The order appealed from should be affirmed, with costs.**

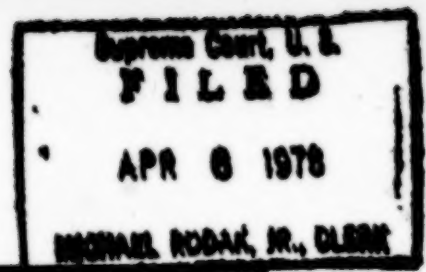
March 1, 1978.

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No. 77-444



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE  
NEW YORK AND HARLEM RAILROAD COMPANY,  
THE 51ST STREET REALTY CORPORATION,  
UGP PROPERTIES, INC.,  
*Appellants,*

*v.*

THE CITY OF NEW YORK, *et al.*,  
*Appellees.*

On Appeal from the Court of Appeals  
of the State of New York

**APPELLANTS' REPLY BRIEF**

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On Appeal from the Court of Appeals  
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**APPELLANTS' REPLY BRIEF**

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**INTRODUCTION**

This reply will focus on one critical issue: Did application of the New York City Landmarks Law to Grand Central Terminal effect a "taking" of Penn Central's property for public use within the meaning of the constitutional guarantees? Neither the appellees nor the supporting *amici curiae* contest Penn Central's assertion in its principal brief (Argument, Section I) that Penn Central had a property interest in

the air rights over Grand Central.<sup>1</sup> Nor do they argue that the "transferable development rights" ("TDRs") made available to Penn Central constitute the just compensation guaranteed by the Due Process Clause (Argument, Section III).<sup>2</sup> In effect, only Penn Central's contention (Argument, Section II) that its property rights have been taken by governmental action remains at issue.

The most significant characteristic of all of the opposing briefs is their wholesale retreat from the opinion of the New York Court of Appeals.<sup>3</sup> That court held that the Landmarks Law was not part of a "general community plan," and that application of the Law to particular pieces of property, such as the Terminal, resembled discriminatory zoning. (J.S.A. 5-6) Nonetheless, the court developed a special rule "for the limited purposes of a landmarking statute." (*Id.* 2-3) It held that Penn Central was not entitled to just com-

<sup>1</sup> The briefs of the parties and *amici* will be cited as follows: appellants Penn Central Transportation Company, *et al.*, as "PCTC Br."; appellees City of New York, *et al.*, as "CNY Br."; the United States as "US Br."; the State of New York as "SNY Br."; the State of California as "Cal. Br."; the Committee To Save Grand Central Station, *et al.*, as "Committee Br."; the National Trust for Historic Preservation, *et al.*, as "National Trust Br."

The Pacific Legal Foundation and the Real Estate Board of New York, Inc., filed briefs *amicus curiae* supporting Penn Central's position.

<sup>2</sup> Appellees' contention that if application of the Landmarks Law to Grand Central is unconstitutional, Penn Central is nonetheless entitled to no compensation but only to a declaratory judgment is addressed *infra*, pp. 17-20.

<sup>3</sup> For a detailed demonstration of just how novel the decision below is, see Costonis, "The Disparity Issue: A Context for the Grand Central Terminal Decision," 91 Harv. L. Rev. 402 (1977).

pensation because it had failed to "establish that there was no possibility of earning a reasonable return on the privately contributed ingredient of the Terminal's value." (*Id.* 9) In reaching this central conclusion, the court, with no attempt at quantification, eliminated from consideration all value "created by social investment" (*id.* 13) and imputed to the Terminal "much income" from Penn Central's other real estate holdings in the Grand Central area. (*Id.* 9) The court acknowledged that if the City of New York were in better financial condition "preservation of historic landmarks through use of the eminent domain power might be desirable, or even required." (*Id.* 14) The opposing briefs implicitly concede that the foregoing reasoning is fundamentally flawed, and they attempt instead to sustain the result on other grounds.

# **I. THERE IS NO CONSTITUTIONAL JUSTIFICATION FOR THE TAKING WITHOUT JUST COMPENSATION OF PENN CENTRAL'S PROPERTY INTEREST IN DEVELOPING THE AIR RIGHTS OVER GRAND CENTRAL TERMINAL.**

In this section, Penn Central will discuss three matters that are central to the positions of the appellees and *amici*: first, the effort to avoid a "taking" inquiry on the ground that the Landmarks Law is a permissible exercise of governmental power; <sup>4</sup> second, the argument that the Landmarks Law is part of a comprehensive zoning plan and, therefore, not subject to challenge absent a showing that an owner has been deprived of all reasonable use of its property; <sup>5</sup> and third, the contention that even if the Law has been unconstitutionally

<sup>4</sup> CNY Br. 20-25, 36; US Br. 17-25; SNY Br. 11-14; Cal. Br. 4-12; National Trust Br. 13-19; Committee Br. 31-39.

<sup>5</sup> CNY Br. 25-27; US Br. 17-19; National Trust Br. 25-27.

applied, Penn Central is not entitled to compensation but only to a declaration of invalidity.\* Although these arguments overlap to some extent, they are separable analytically.

**A. The Application of the Landmarks Law, Even If a Permissible Exercise of Government Power, Did Effect a Taking of Penn Central's Property Interest.**

The appellees and supporting *amici* argue that because the Landmarks Law is a permissible manifestation of the government's undefined "police power," its application to Grand Central does not require just compensation. CNY Br. 20-22; Cal. Br. 4-12; Committee Br. 31-39. In so arguing, they attach unwarranted significance to labels and disregard the substance of the challenged governmental action.

Whether the City's actions are characterized by the legislature, or those defending it, as exercises of the "police power" or of "eminent domain" is not controlling. These conclusions signal not the start of judicial analysis, but its end result. The critical issue here is not the source of power for the Landmarks Law but what its actual effects are. As this Court has previously stated: "The incantation pronounced at the time [of the government's action] is not of controlling importance; our primary concern is with the accomplishment." *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925); cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

To acknowledge, as Penn Central has, that the pursuit of cultural objectives such as the preservation of landmarks constitutes a permissible exercise of govern-

\* CNY Br. 37-39; Cal. Br. 12-23; Committee Br. 55-56.

ment power does not mean, as appellees contend, that the constitutional requirement of just compensation becomes inapplicable. The most comprehensive articulation of the scope and breadth of governmental power to take action designed to improve the quality of life is probably found in *Berman v. Parker*, 348 U.S. 22 (1954). The broad declaration of legislative authority and discretion in that case was accompanied by an unqualified assurance that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36. There was no suggestion that corners could be cut if the government purported to exercise this broad power by way of regulation rather than eminent domain. However laudable may be the Government's objective, where that objective is accomplished in a manner that forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," the governmental action triggers the protections of the Fifth and Fourteenth Amendments.<sup>7</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>7</sup> The Solicitor General discusses several Federal statutes assertedly relating to historic preservation. US Br. 1a-9a. Significantly, the most important of those provisions authorize the use of Federal funds to compensate owners whose property is burdened or appropriated. Historical and Archeological Preservation Act of 1974, 16 U.S.C. § 469a-1(b); Amtrak Improvement Act of 1974, 49 U.S.C. § 1653(i)(3) and (4); Urban Mass Transportation Act of 1964, 49 U.S.C. § 1602(b).

The statutes demonstrate, at the Federal level, an appreciation that historical preservation should, where appropriate, be accomplished through use of the eminent domain power. The Federal policy thus stands in marked contrast to that adopted by the City of New York.

This Court has pursued several lines of inquiry to decide when governmental action constitutes a "taking" for Due Process Clause purposes. Appellees would focus on only one of those lines; they assert that unless the challenged governmental action wholly destroys the value of the affected property, then there has been no taking that requires just compensation. This narrow and cramped view is not supported by decisions of this Court, and, if adopted, would result in an immeasurable erosion of Due Process Clause protections. Only by analyzing all aspects of challenged governmental action pragmatically and comprehensively can this Court satisfy the "political ethics" required by the Due Process Clause. *United States v. Cors*, 337 U.S. 325, 332 (1949).

*Diminution-in-value theory.* The appellees do not dispute that application of the Landmarks Law has deprived Penn Central of substantial property rights. They argue, however, that because the Law has not eliminated *all* reasonable use of the Terminal property, no taking has occurred. In effect, they would make the diminution-in-value test absolutely dispositive of the "taking" issue. No decision of this Court has so held. Indeed, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), a case heavily relied upon by the appellees, this Court said explicitly that "[a]lthough a comparison of values before and after is relevant . . ., it is by no means conclusive." *Id.* at 594. This Court has repeatedly held that property had been taken even if not made wholly valueless. *See* PCTC Br. 24-28.

The decision in *Goldblatt* does not, contrary to the contention of the Solicitor General, establish a principle that land-use regulation that serves a substantial public purpose is validated merely by permitting a

reasonable use of the property in question. US Br. 19-20. In that case this Court first inquired whether the challenged regulation had impaired the value of the land owner's property so as to warrant compensation. Only after concluding that "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question," 369 U.S. at 594, did the Court go on to hold that a prohibition of mining could be upheld as within the police power, taking into account that the owner was left with a reasonable use of the property.

The opinion in *Goldblatt* was written by Mr. Justice Clark, who also wrote for a unanimous Court the next Term in *Dugan v. Rank*, 372 U.S. 609 (1963). There, this Court held that, in the course of implementing a Federal reclamation project, the United States had effectively deprived plaintiffs of certain water rights which they claimed. Characterizing the government's actions as an "[i]nterference with or partial taking" of the water rights claimed, this Court analogized those actions to "interference or partial taking of air space over land," *id.* at 625, such as in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). If the claimed water rights were valid, the government would be liable in damages to the claimants.

In short, government action that diminishes the value of property is a sufficient condition for the courts to require payment of just compensation.\* Such a diminution in value has clearly been demonstrated here.

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\* In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), for instance, a city zoning ordinance was held unconstitutional as applied because of the extent of the property owner's injury and the ordinance's lack of connection to the general welfare.

It is not, however, a necessary condition of compensation that the property's value be reduced virtually to nothing,\* as *Dugan v. Rank, supra*, and other cases demonstrate.<sup>10</sup>

**Harm-benefit theory.** Penn Central has previously noted Professor Freund's formulation of the test for determining when just compensation is due: If government regulates property because it is useful to the public, it does so by exercising the power of eminent domain; if government regulates property because it is harmful to the public, it does so through the police power. In the former case, just compensation is required, while in the latter it is not. See PCTC Br. 32 n. 27. This "harm-benefit" theory has been followed

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\* Appellees dispute Penn Central's treatment of the air rights over Grand Central as a property interest separate from the rights in the Terminal itself. CNY Br. 21. The City makes no effort, however, to refute the numerous authorities cited in support of Penn Central's position on that issue. See PCTC Br. 13-16.

If Penn Central is correct in considering the air rights separately, it is entitled to recover just compensation even on appellees' view of the diminution-in-value theory. Appellees agree that the air rights over the Terminal have been completely extinguished.

Penn Central's case does not turn upon whether this Court adopts the phrase "deprivation of air rights" rather than "a restriction on use." The former phrase is used by the court of appeals. (J.S.A. 1) Appellees and the amici find the latter more compatible with their contentions. The ultimate question, however, is not how the governmental action is described but whether its objective and impact are such that the resulting cost should be borne by the public or by a private property owner.

<sup>10</sup> If the appellees are correct then the proper test in *Berman v. Parker, supra*, (on which they heavily rely) should have been whether the affected property owners there could have earned a reasonable return. This Court obviously did not engage in any such analysis.

in several decisions of this Court. *Goldblatt v. Town of Hempstead, supra*; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). Here, the appellees have made it indisputably plain that the application of the Landmarks Law is intended to achieve substantial benefits for the general public; there can be no valid contention that construction of an office building over the Terminal would be harmful to health, safety, or morals.

**"Fairness" test.** The "fairness" test articulated by Professor Michelman is, in many respects, the scholarly counterpart of the "political ethics" commanded by the Fifth and Fourteenth Amendments. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harv. L. Rev.* 1165 (1967). See PCTC Br. 29-30 n. 25. The central question in this inquiry is one that this Court has posed several times—has the government loaded "upon one individual more than his just share of the burdens of government?"<sup>11</sup> If one individual is overburdened, then the government has acted to take his property, and compensation is required. That is precisely Penn Central's contention here.

Given that there are several tests that might be used, the obvious question is how this Court should apply those tests.<sup>12</sup> Here, Penn Central has suffered a

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<sup>11</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). Or, as the court said in *Just v. Marinette County*, 201 N.W. 2d 761, 767 (Wis. 1972), "[t]he loss caused the individual must be weighed to determine if it is more than he should bear."

<sup>12</sup> This Court has suggested other criteria, but those just discussed are most pertinent here. See Berger, "A Policy Analysis of the Taking Problem," 49 N.Y.U.L. Rev. 165 (1974).

very substantial economic loss—a loss imposed for the benefit of the general public—and it alone bears that loss. The City has fully accomplished its goal of freezing Grand Central in its present form as effectively as if it had acquired title to the facade and air rights above the Terminal.<sup>13</sup> It is plain, therefore, that Penn Central has satisfied the requirements of all three of the tests. Since meeting the requirements of even one line of analysis is sufficient to be awarded just compensation, the particular circumstances of this case militate even more strongly in support of such a result.

In its principal brief, Penn Central relied heavily on *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, *supra*. These decisions are cogent exemplars of the constitutional analysis just described. Significantly, neither the appellees nor their supporting *amici* have offered any convincing rationale on which *Causby* and *Griggs* can be distinguished. See CNY Br. 36; US Br. 23; National Trust Br. 31. This Court has already rejected one attempted ground of distinction (that the City did not physically occupy or invade Penn Central's property) by adopting a practical approach to the effects of governmental action. Since the actual effects of a legal restraint or a physical invasion are the same, they should be treated similarly, as this Court held in *United States v. General Motors*

<sup>13</sup> In *South Terminal Corp. v. Environmental Protection Agency*, 504 F. 2d 646 (1st Cir. 1974) (cited in National Trust Br. 29 n. 37), the court defined as a taking the situation where "a right to use or burden property in a particular and permitted way [is] transferred from the original owner to another person, or to a governmental body." 504 F. 2d at 679. That is exactly what the City did here when it effectively placed the Landmarks Commission in control of Penn Central's air rights. See also *Denver v. Denver Buick, Inc.*, 141 Col. 121, 347 P. 2d 919 (1959).

*Corp.*, 323 U.S. 373, 378 (1945).<sup>14</sup> See PCTC Br. 28-33. The second attempted distinction (that only a future use by Penn Central is being eliminated) is equally untenable. Prior decisions of this Court long ago made it clear that both present and reasonably expected future uses are protected by the Due Process Clause. *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878). See cases cited in PCTC Br. 13-16, 37-38.

Reversing the court below, therefore, requires no shift away from earlier decisions by this Court. A comprehensive and practical analysis of the effect of the City's actions here is entirely consistent with and fully supported by prior decisions of this Court under the Due Process Clause. Indeed, the analysis proposed by Penn Central is in complete accord with that of the Solicitor General: "... the appropriate disposition of an argument that a regulation amounts to a taking must depend more on the social and economic realities of a particular situation than on any analysis of words and phrases." US Br. 20. The appellees' test, by contrast, is rigid and unyielding, and would cast aside Mr. Justice Pitney's trenchant observation that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U.S. 316, 328 (1917). As demonstrated in the next subsection, the "character" of the Landmarks Law's operation here clearly dem-

<sup>14</sup> Professor Michelman has aptly described the limits of the physical-invasion test: It "can never be more than a convenience for identifying *clearly compensable* occasions. It cannot justify dismissal of any occasion as *clearly noncompensable*. Michelman, *supra*, 80 Harv. L. Rev. at 1228 (emphasis in original).

onstrates that the City has taken Penn Central's property for the benefit of the public.<sup>15</sup>

**B. As the Court Below Said: "This Is Not a Zoning Case."**

The appellees expend considerable effort, CNY Br. 22-27, attempting to circumvent the holding of the Court of Appeals that "[t]his is not a zoning case." (J.S.A. 4) They and the *amici* assert that the Landmarks Law is "a general community plan" to preserve landmarks. CNY Br. 25-26. On this basis, they attempt to analogize the Landmarks Law to comprehensive zoning ordinances, the general constitutionality of which has been upheld. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In effect, they are asking this Court to substitute its judgment about the nature of the Landmarks Law for that of the highest court of New York. The court below construed the statute as a matter of State law. In such circumstances, this Court normally defers to the construction of the state court, and it should do so here as well.

Labeling the Landmarks Law as a "community plan"—a characterization explicitly rejected by the court

<sup>15</sup> In asserting that Penn Central has been left with a reasonable use of the Terminal, appellees and *amici* overlook an essential element of the Court of Appeals decision. The court's conclusion to that effect is limited to the "privately contributed" ingredient of the Terminal's value; it totally disregards the undefined and undefinable portion of the Terminal's value allegedly contributed by organized society. Neither appellees nor the *amici* have attempted to justify this attempted dichotomy between "private" and "social" valuation. The Solicitor General agrees in substance with Penn Central that any such attempted separation is "pointless." (US Br. 21-22 n.18) Unless the social-contribution theory advanced by the Court of Appeals is accepted, its reasonable-use conclusion cannot be sustained.

below (J.S.A. 5)—cannot, in any event, justify its application here. Zoning ordinances upheld by this Court fall into two general categories. In one, the statute divides a municipality into zones and categorizes the types of buildings which may be constructed in each (*e.g.*, residential, industrial, commercial and the like). *See Zahn v. Board of Public Works*, 274 U.S. 325 (1927). In the second, the ordinance prescribes physical limitations on structures that might be built (*e.g.*, height limitations, set-back requirements, maximum floor areas, and so on). *See Welch v. Swasey*, 214 U.S. 91 (1909). Different combinations of ordinances exist, varying from city to city.<sup>16</sup>

These categories of zoning laws share two important characteristics. First, they are comprehensive; they apply to all property within the jurisdiction of the zoning authority, and "[e]ach property owner in the zone is both benefited and restricted from exploitation." (J.S.A. 4) Second, within whatever restrictions they impose, the landowner is free to develop his property without further control by the zoning authority. For example, in an area zoned "residential," a property owner may build any of a number of different kinds of homes—row houses, bungalows, ramblers, etc. Similarly, within applicable physical limitations, the landowner may use any of a number of architectural plans to achieve the use of the property most desirable to him.

<sup>16</sup> A third category, which restricts certain offensive activities to particular locations, is not pertinent here. *See Young v. American Mini Theatres*, 427 U.S. 50 (1976). Also inapplicable here is a fourth category, which defines what persons may inhabit residential structures. *See Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The Landmarks Law is quite different. First, as the Court of Appeals said, "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan." (J.S.A. 5) The Law, by definition, applies only to *selected* buildings within the city limits of New York." The Landmarks Commission is statutorily vested with the discretion to protect structures having a "special character" or a "special historical or aesthetic interest." N.Y.C. Admin. Code § 205-1.0 (J.S.A. 76). The Commission is "highly selective in what it designates" as a Landmark, as its Chairman explained. (J.A. 67) On its face, therefore, the Landmarks Laws cannot be said to be "comprehensive." Moreover, "the burden of limitation" is borne solely by the Landmark owner, who receives no corresponding benefit. (J.S.A. 4, 5)

Second, once property has been selected as a landmark, the owner's ability to alter that property is reduced virtually to nothing. Thus, the Landmarks Commission has determined that the facade of Grand Central may not be altered. Moreover, a structure above the facade that would, in the judgment of the Commission, make the Terminal aesthetically less pleasing is also forbidden. Unlike the property owner operating within a zoning ordinance, Penn Central has no free-

<sup>17</sup> The appellees contend that over five hundred buildings have been declared "landmarks." CNY Br. 26. This is surely a trivial number compared with the total number of structures that exist in New York, and it is hardly evidence of comprehensiveness. Moreover, the list of designated landmarks indicates that a very substantial number of the structures are already owned by the City, the State, or the Federal Government—*e.g.*, the Brooklyn Bridge, the Statue of Liberty, the Municipal Asphalt Plant, and the 83rd Police Precinct House and Stable. Landmarks Preservation Commission of the City of New York, "Landmarks and Historic Districts" (1977).

dom to alter its property at all. Even a supporter of the decision below concedes that the operation of the Landmarks Law is a "draconian regulatory program." Costonis, *supra*, 91 *Harv. L. Rev.* at 411.

The National Trust for Historic Preservation explicitly labels the Landmarks Law a "height limitation." National Trust Br. 32. If that were the only restraint imposed by the Law, Penn Central would be free to demolish Grand Central and construct a low-rise office building or department store. Presumably, the appellees would be as disturbed by that possibility as they are at the prospect that Penn Central will construct a high-rise office building over the present structure. The point is clear—the Landmarks Law is not simply a height limitation; it freezes the Terminal in place and gives the public a perpetual right to unimpeded enjoyment of its facade and the air above.

Appellees also rely on cases sustaining the validity of historic-district legislation. CNY Br. 24. Historic-district statutes are, however, highly similar to zoning restrictions: "In each case, owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan." (J.S.A. 5; *see* PCTC Br. 22-23) The distinction between zoning and historic-district regulation on the one hand, and the designation of particular buildings as landmarks on the other, is important for Due Process Clause analysis. In *Maher v. City of New Orleans*, 516 F. 2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), the court of appeals declared that the New Orleans historic-district ordinance "is of general application to a well-defined geographic area." 516 F. 2d at 1061. The court explicitly stated that the purpose of the ordinance was to preserve "the 'tout ensemble' of

the historic French Quarter." *Id.* at 1067. There is no "tout ensemble" at issue here; only the Terminal is frozen in place, while surrounding property owners remain free to alter or develop. In short, as the court below understood, the Landmarks Law does not operate "to further a general community plan." (J.S.A. 5)

*Village of Euclid v. Ambler Realty Co.*, *supra*, and its progeny do not validate all land-use regulations, as appellees appear to assume. Comprehensive community plans are generally valid not because they relate to land use but because they constitute a fair and equitable distribution of the burdens and benefits of governmental regulation. Other attempts at land-use control constitute compensable takings essentially because they fail to meet that test. The Landmarks Law as applied to the Terminal is such a taking because it imposes upon a private property owner the full cost of an improvement in the quality of life that is designed to benefit all who live in and visit New York City.

It is plain why the court below relied upon novel and erroneous legal principles in denying Penn Central just compensation. The court realized that legal rules applicable to zoning ordinances simply were immaterial here, because "[t]his is not a zoning case." (J.S.A. 4) In order to uphold the application of the Landmarks Law, the court looked to "the limited purposes of a landmarking statute." (J.S.A. 2-3) Such "limited purposes," however, cannot save the Law, *see* PCTC Br. 20-23, and, as just demonstrated, zoning principles are inapplicable. Thus stripped of the two explanations offered in its defense, the conclusion is clear that the

Landmarks Law has operated to take Penn Central's property interest.

**C. A Declaration That the Landmarks Law Was Unconstitutionally Applied Here Is Insufficient; Penn Central Is Entitled to Just Compensation for the Taking of Its Property.**

The appellees also argue that even if the Landmarks Law, as applied here, violated the Due Process Clause, Penn Central is nonetheless not entitled to damages or compensation. CNY Br. 37-39. Appellees are incorrect, however, as some of the very cases they rely upon demonstrate.

In *City of Buffalo v. J.W. Clement Co.*, 28 N.Y. 2d 241, 269 N.E. 2d 895 (1971), the court below discussed at length the concept of a "*de facto* taking." Such a taking arises where government actions "in effect deprive individuals of full or unimpaired use of their property." *Id.* at 253, 269 N.E. 2d at 902. No physical invasion of the property is required. A *de facto* taking, as in the present case, can be caused by "a legal interference with the physical use, possession or enjoyment of the property." *Id.* at 255, 269 N.E. 2d at 903. Grand Central Terminal is subject to the direct legal restraint that its exterior appearance may not be altered. In effect, the right to manage or control any further development of the property has been acquired by the City of New York. In such circumstances, it is plain that a remedy in damages (sometimes referred to as "inverse condemnation") is available to Penn Central. *Charles v. Diamond*, 4 N.Y. 2d 318, 329-30, 360 N.E. 2d 1295, 1303 (1977); *Selby Realty Co. v. City of San Buenaventura*, 109 Cal. Rptr. 799, 805, 514 P. 2d 111, 117 (Cal. 1973); *see generally* Van Alstyne, "Taking or Damaging by Police Power: The Search for In-

verse Condemnation Criteria," 44 *So. Cal. L. Rev.* 1 (1970)."

The other authorities cited by the City in support of its argument against damages involve comprehensive municipal zoning ordinances whose validity was upheld. *See, e.g., Veling v. Ramsey*, 94 N.J. Super. 459, 228 A.2d 873 (Super. Ct. N.J. 1967). Such decisions are hardly precedential in this case, which does not involve a comprehensive zoning ordinance and which the City concedes, *arguendo* in its discussion of damages, to be invalid.

As a subsidiary point, the appellees argue that because the City did not institute formal condemnation proceedings against the Terminal (a traditional way for government to acquire title to private property), there has been no taking here. CNY Br. 37-38. Apparently the City believes that the form of government action determines whether or not Due Process Clause protections apply. Such a rule would eviscerate the Clause. No government would resort explicitly to eminent domain if it could achieve the same result—without cost—merely by calling its actions an exercise of the police power. Plainly it is the practical, substantive effect of government restrictions on private property that controls here, not the mode by which the government proceeds. *In re Penn Central Transportation*

<sup>18</sup> The State of California cites several cases in which purported exercises of the police power were declared invalid and in which no damages were awarded. Cal. Br. 21-22. The reported opinions in those cases, however, do not specifically state whether the private landowners sought damages or whether they requested only declaratory relief. The cases California relies upon thus provide no support for its argument that compensation need not be awarded here if the Landmarks Law, as applied, is declared unconstitutional.

*Company*, 384 F. Supp. 895, 939-40 (Spec. Ct. 1974). *See* PCTC Br. 28-33. Whether a taking is *de facto* or *de jure*, it is still a taking for which just compensation must be paid. *Keystone Associates v. State*, 371 N.Y.S.2d 814, 817 (N.Y. Ct. Cl. 1975); *Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E. 2d 666, 671 (Mass. 1965). The critical point here is that the Landmarks Commission was authorized by the Landmarks Law to take the actions it did affecting Grand Central." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 n. 2 (1952) (Douglas, J., concurring) As this Court has made plain, "the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution." *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 22 (1940).

The responsible legislatures in *Causby* and *Griggs*, *supra*, did not decide to take and pay for land adjoining the airports. Nonetheless, when this Court determined that the government actions in both cases constituted a taking, it held the legislatures to the constitutional consequences of those actions, *i.e.*, the payment of just compensation. Here, the City of New York has accomplished directly, not by accident or inadvertence, precisely what it desired with respect to the Grand Central Terminal; *a fortiori*, it too should be held constitutionally responsible for its actions.

Finally, the City makes the policy argument that awarding just compensation for temporary takings would deter local officials from enacting "innovative but untested legislation." CNY Br. 39. But that argument proves too much; the Due Process Clause itself

<sup>19</sup> The City makes no claim of sovereign immunity here.

is designed to function as a deterrent to arbitrary and confiscatory governmental actions. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922). The appellees' policy argument is thus nothing more than a repetition of their plea that the protections of the Due Process Clause should be ignored here.

## II. THE PRIVATE PROPERTY GUARANTEE IS AN ESSENTIAL PROTECTION AGAINST GOVERNMENTAL ABUSE.

The appellees and their supporting *amici* urge that the preservation of historic landmarks is a task of paramount governmental concern. CNY Br. 8-12, 25-27; National Trust Br. 13-14, 19-22; Committee Br. 31-39. Moreover, they defend the importance of landmark legislation because it benefits the public at large.<sup>20</sup> The City stresses the importance of the "physical environment" to the "economic and cultural life" of New York, and it specifically states that landmark preservation "is necessary to the general welfare of the people." CNY Br. 11, 25.

That argument only demonstrates more convincingly why the protections of the Due Process Clause should be at their highest in this case. It is precisely when a strong public interest asserts itself in the political arena that constitutional guarantees are most in danger, and the protections of a vigilant judiciary most necessary. Moreover, it is precisely because the benefits are enjoyed by the public at large that the

<sup>20</sup> The National Trust claims that Penn Central receives the same benefit as other citizens from having the Terminal frozen in its present form. National Trust Br. 26-27. It is certainly cold comfort to a bankrupt railroad and its creditors that Penn Central owns a fine-looking building which it may never alter.

public at large should bear the costs.<sup>21</sup> And it is precisely because those costs are now borne alone by Penn Central that the Landmarks Law violates Due Process.

As this Court said in *United States v. Sponenbarger*, 308 U.S. 256, 266 (1939):

"The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner."

See also cases cited at PCTC Br. 20-23; *State v. Johnson*, 265 A. 2d 711 (Me. 1970). Penn Central does not contend, as the City claims, CNY Br. 26, that the benefits and burdens of all government regulation must be uniform and reciprocal. Rather, it is because the general public receives *all* of the benefits from the Landmark designation while paying *none* of the costs that the Law is discriminatory.<sup>22</sup>

<sup>21</sup> The National Trust was chartered by Congress, in part, "to facilitate public participation" in landmark preservation. 16 U.S.C. § 468. Penn Central agrees that if Grand Central is to be frozen, there *should* be "public participation." The problem with the operation of the Landmarks Law in the present case is that *there is no public participation*. Penn Central bears all the costs. Indeed, the essential claim here is that the public should participate by having the City pay just compensation to Penn Central.

<sup>22</sup> The National Trust devotes an extensive portion of its brief to rebuttal of an argument that Penn Central never made (explicitly or implicitly)—that the Landmarks Law violates the Equal Protection Clause of the Fourteenth Amendment. National Trust Br. 23-28. Penn Central does not contend that all buildings in the city must be designated landmarks, or none. If, however, by such designation the City, as here, eliminates private control over the development of Penn Central's property, then the City must pay just compensation for those restrictions.

Penn Central earlier referred to the statutory framework within which the Landmarks Commission operates: The Law authorizes the Commission to designate as a landmark any structure "which has a special character or special historical or aesthetic interest or value." (J.S.A. 76) Designation is inevitably arbitrary, or at least subjective, because it is basically a matter of taste. Indeed, the Solicitor General concedes that "designation of particular buildings as landmarks may create opportunities for arbitrariness not present in broad-area zoning." US Br. 19.<sup>22</sup> If just compensation were afforded to the property owners affected, however, Penn Central could have no objection, for it is plain that the government may appropriate whatever property it chooses for a valid public purpose. Instead, it is the unchecked power of the Landmarks Commission that is asserted by the appellees that poses the constitutional issue. The owners of "special" structures that are coveted for public use will always be in a small minority at the ballot box and in legislative bodies. Their only protection lies in the enforcement of constitutional guarantees by this Court.

The Due Process Clause, by requiring government to pay when it takes property, necessarily imposes a

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<sup>22</sup> Recognizing this potential for arbitrariness—a fact disregarded by the appellees and the other *amici*—the Solicitor General suggests as a remedy challenging whether the particular landmark designation is appropriate. US Br. 19. Yet that procedure affords no protection at all; given the immense discretion vested in the Landmarks Commission, the courts would be properly reluctant to become arbiters of aesthetic value-judgments.

While the Solicitor General has proposed the wrong remedy, he is eminently correct—and in complete accord with Penn Central's position—that application of the Landmarks Law is fraught with the likelihood of arbitrariness.

discipline upon the sovereign. Should that discipline be removed, it would become easy and commonplace for government to single out individual property owners to bear disproportionate burdens, all for the benefit of society at large. *Armstrong v. United States*, *supra*, 364 U.S. at 49; *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 416.

There should be no mistake about the extraordinary breadth of the claim made by the appellees. They are asserting that the City (or any other governmental entity) has a constitutional right to keep Grand Central as it is for the benefit of the public, while paying none of the costs. If that claim is upheld, then the language of the Constitution—"nor shall private property be taken for public use, without just compensation"—will itself have become an historical landmark, a mere curiosity of little further usefulness.

**CONCLUSION**

This Court should reverse the decision of the court below, declare the application of the Landmarks Law to Grand Central Terminal to have been a taking of private property for public use, and remand, with costs, for determination of the amount of just compensation to be paid Penn Central.

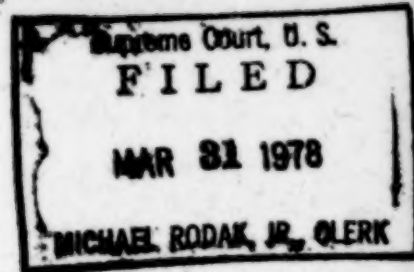
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April, 1978



No. 77-444

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**PENN CENTRAL TRANSPORTATION Co., ET AL.,**  
**APPELLANTS**

*v.*

**THE CITY OF NEW YORK, ET AL.**

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**ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION CO., ET AL.,  
APPELLANTS

v.

THE CITY OF NEW YORK, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

## INTEREST OF THE UNITED STATES

Congress has determined that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development \* \* \*." National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. 470(b). More than 40 years ago, Congress "declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." Historic Sites, Buildings, Objects, and Antiquities Act of 1935, 49 Stat. 666, 16 U.S.C. 461. Fed-

eral historic preservation programs are discussed more fully in the Appendix, *infra*, pp. 1A-9A. These efforts include assistance to state and local governments for the expansion and acceleration of their historic preservation programs and activities. From fiscal year 1971 through fiscal year 1977, more than \$3.7 million in federal funds were distributed to New York State for historic preservation purposes. Of this sum, approximately \$640,000 was allocated to New York City. The United States thus has a substantial interest in state and local historic preservation endeavors.

The United States itself may both regulate private property for the public weal and take private property for a public use. See, *e.g.*, *Mutual Loan Co. v. Martell*, 222 U.S. 225, 223; *Barbier v. Connolly*, 113 U.S. 27, 31; *Kohl v. United States*, 91 U.S. 367, 371-374; *Pollard's Lessee v. Hagan*, 3 How. 212, 222-223. In the latter instance, but not the former, the Taking Clause of the Fifth Amendment requires the United States to pay "just compensation" to the former owner of the condemned property. Because it may be called on to pay just compensation if a law designed as a regulation of uses is deemed to be a taking, the United States is interested in the proper relationship between regulations and takings.

#### QUESTION PRESENTED

Whether New York City's Landmarks Preservation Law, as applied to Grand Central Terminal, takes appellants' property without just compensation.

#### STATEMENT

Grand Central Terminal is located at the intersection of Park Avenue and 42d Street in the heart of midtown Manhattan. Grand Central is the hub of an extraordinarily busy and intricate transportation network, where commuter trains, long-distance trains, the New York City subway, private and public bus lines, and readily available taxicab service all meet. The completely submerged double-level track system at the Terminal permits the accommodation of large numbers of trains without loss of usable land area. The presence of the Terminal has enhanced the value of surrounding real estate and has contributed significantly to the emergence of Park Avenue as a prime residential district (J.S. App. 20a).

Grand Central Terminal has become one of New York's best-known buildings, a major attraction for visitors and residents alike (J.S. App. 47a). Constructed at the beginning of the twentieth century according to a plan selected in a nationwide architectural competition, the Terminal was formally opened to the public in 1913 (*ibid.*). It was immediately recognized as a triumph of comprehensive urban design, an ingenious solution to the problem of creating sufficient space for movement and interchange of passengers and freight in a city environment.<sup>1</sup>

<sup>1</sup> One contemporary critic praised the achievement in the following effusive terms:

"The Grand Central Terminal is not only a station; it is a monument, a civic center or, if one will, a city. Without exception, that part of it which is the station is not only the greatest head

Among the best-known features are the fine Beaux Arts facade, the monumental statuary group of Mercury, Hercules, and Minerva ranged around the clock on the 42d Street side of the Terminal, and the vast interior space of the Grand Concourse—125 feet high to the vaulted ceiling covered with constellations painted by the French artist Paul Helleu (A. 108-110; R. 2232-2238; Def. Exhs. D1-D5).

Appellant New York and Harlem Railroad Company ("NYHRR") owns Grand Central Terminal (A. 8). Appellant Penn Central Transportation Co., in turn, owns approximately 95 percent of the stock of NYHRR, and it has leased the Terminal from NYHRR for a 300-year term expiring in 2274 (A. 7-9). Penn Central also owns numerous neighboring properties in midtown Manhattan, including the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. See A. 94-97; *New Haven Inclusion Cases*, 399 U.S. 392, 438.

Penn Central is the product of a merger between the Pennsylvania and New York Central Railroads. That merger was approved by this Court in 1968. *Penn-Central Merger Cases*, 389 U.S. 486. For many decades New York City permitted only the Pennsylvania and New York Central Railroads to build and operate stations in New York. Josephson, *The Robber*

(Continued)

station in the United States but the greatest station of any type not only on this continent but in the world." (Droege, *Passenger Terminals and Trains* 159 (1916).)

*Barons* 122, 182-183 (1962); Burgess, *Centennial History of the Pennsylvania Railroad Company* 266, 469 (1949). Some railroads shared the use of these facilities,<sup>2</sup> and others were simply denied direct access to the City.<sup>3</sup> Josephson, *supra* at 293; Burgess, *supra* at 463.

On August 2, 1967, Grand Central Terminal was designated a landmark, under New York City's Landmarks Preservation Law (J. S. App. 53a).<sup>4</sup> N.Y.C. Charter § 2004; N.Y.C. Administrative Code, Ch. 8-A, §§ 205-1.0 to 207-21.0 (McKinney's 1968) (reprinted in J.S. App. 76a-113a). Although Penn Central opposed the assignment of landmark status to the Terminal, it did

<sup>2</sup> The NYHRR and the New York, New Haven, and Hartford Railroad used Grand Central Terminal, while the Long Island Railroad used Pennsylvania Station. Josephson, *The Robber Barons* 122 (1962); Burgess, *Centennial History of the Pennsylvania Railroad Company* 524 (1949).

<sup>3</sup> The Lackawanna, Erie, Lehigh Valley, Jersey Central, Susquehanna, and Baltimore & Ohio were forced to terminate on the west side of the Hudson River. On several occasions, this Court has confronted the problems suffered by those railroads unable to secure the right to enter New York City. See, e.g., *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 n. 9; *United States v. Baltimore & Ohio R.R.*, 231 U.S. 274; *United States v. Baltimore & Ohio R.R.*, 225 U.S. 306.

<sup>4</sup> The law was adopted in 1965, pursuant to the enabling provisions of New York State's Historic Preservation Act (formerly N.Y. Gen. City Law § 20(25-a) (McKinney's 1968), now N.Y. Gen. Mun. Law § 96-a (McKinney's Cum. Supp. 1977), enacted nine years earlier.

An 11-member Landmarks Preservation Commission, including at least three architects, one qualified historian, one realtor, and one city planner or landscape architect, may designate a particular structure a landmark if the Commission finds, after a public hearing, that the structure is at least 30 years old and that it possesses

(Continued)

not seek judicial review of the Landmarks Preservation Commission's assessment of the Terminal's historic and cultural significance.<sup>5</sup>

The designation of Grand Central Terminal as a landmark required Penn Central to keep the Terminal "in good repair" (Section 207-10.0(a)), and not to make any unauthorized alteration in the Terminal's exterior architectural features (Sections 207-5.0 to 207-9.0).

The designation also had implications under New York City's zoning law, which imposes floor area ratio (FAR) limitations on improvements in different districts. Because landmarks may not be altered in ways that destroy their historic value, classification of a particular structure as a landmark may preclude development of the landmark site to the full extent

(Continued)

"a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation \* \* \*" (Sections 207-1.0(n) and 207-2.0(a)(1)). Designations are subject to disapproval or modification by the City Board of Estimate after the Board has considered a report by the City Planning Commission concerning the relationship of the landmark designation to "the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved" (Section 207-2.0(g)(1)). In this case, the Board of Estimate confirmed the landmark designation on September 21, 1967 (J.S. App. 3a).

<sup>5</sup> The Commission's report stated (R. 2240):

"Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts."

ordinarily permissible under the zoning law. To take account of this, New York City amended its Zoning Resolution in May 1968 to allow development rights to be transferred from a landmark site to adjacent lots.<sup>6</sup> Buildings on lots receiving such transferred rights were permitted to exceed the applicable FAR maximum by 20 percent, and they could do so either by being taller or by using more of the lot's area than otherwise permitted. In December 1969 the City broadened the group of lots to which development rights could be transferred from landmark sites in commercial districts such as that in which Grand Central Terminal is located.<sup>7</sup> For transfers from sites of this kind, the 1969 amendment also dropped the 20 percent limit on increases above the ordinarily permissible FAR. See N.Y.C. Zoning Resolution §§ 74-79 to 74-793 (McKinney's 1968) (reprinted in J.S. App. 113a-118a).<sup>8</sup>

<sup>6</sup> The term "adjacent lot" was defined as (J.S. App. 113a): "[A] lot which is contiguous to the lot occupied by the landmark building or one which is across a street and opposite to the lot occupied by the landmark building, or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by the landmark building."

<sup>7</sup> In a qualifying commercial district, "adjacent lot" also includes (J.S. App. 113a-114a):

"A lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections from [*sic*; form] a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership \* \* \*."

<sup>8</sup> For a participant's description of the history of the zoning amendments, see Marcus, *Air Rights Transfer in New York City*, 36 Law and Contemp. Prob. 372, 374-375 (1971).

Meanwhile, on January 22, 1968, nearly six months after the Terminal was designated a landmark, Penn Central entered into a lease and sub-lease arrangement with appellant UGP Properties, Inc., a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the agreement, UGP was to construct and operate a multi-story office building over the Terminal (J.S. App. 48a). UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter (*ibid.*). The term of the lease was 50 years, and UGP received an option to renew for an additional 25 years (J.S. App. 54a).

The first plan developed by appellants for the new office building entailed preservation of the Terminal's facade underneath a 56-story tower.<sup>9</sup> Appellants applied to the Commission for a certificate of "no exterior effect on protected architectural features." See J.S. App. 3a, 54a. Such an application requires the Commission to determine (J.S. App. 90a):

- (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site \* \* \*, and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site \* \* \*.

<sup>9</sup> In 1911, during construction of the Terminal, there was a plan to erect a 20-story office tower over the Terminal building. The plan was eventually discarded. The tower proposed in 1911 bears no resemblance to the architect's renderings of the modern

Only if the Commission reaches negative answers to both inquiries may the certificate be granted, and only if the certificate is granted may the alterations be made (J.S. App. 90a-91a). The Commission denied appellants' application, after a hearing, on September 20, 1968 (J.S. App. 54a). Appellants did not seek judicial review of this decision (J.S. App. 3a-4a).

The architect engaged by appellants then produced a second design, which envisaged destroying large parts of Grand Central Terminal (J.S. App. 22a). Appellants applied to the Commission for a "certificate of appropriateness," which an owner must obtain under Section 207-6.0 of the Landmarks Preservation Law before destroying a landmark. Although they submitted both plans with their application, appellants regarded the second design as economically preferable (J.S. App. 48a).

In response to an application to alter the exterior of a landmark the Commission must determine "whether the proposed work would be appropriate for and consistent with the effectuation of the purposes" of the Preservation Law (J.S. App. 91a). Where demolition of a landmark is proposed, Section 207-6.0(d) directs the Commission to "consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest of value" (J.S. App. 93a). Em-

skyscraper that Penn Central now wishes to build on the Terminal site. See *New York Times*, October 12, 1975, § 8, p. 8, col. 1.

ploying these criteria, the Commission, after two public hearings, denied appellants' application (J.S. App. 3a).<sup>10</sup> Again, appellants did not seek judicial review of the Commission's decision (J.S. App. 3a-4a).

Instead, appellants initiated this lawsuit, challenging the constitutionality of the Landmarks Preservation law as applied to Grand Central Terminal. Appel-

<sup>10</sup> Section 207-8.0(a) establishes a detailed procedure pursuant to which a certificate of appropriateness may be obtained for demolition or alteration of a landmark, if the applicant demonstrates that the landmark site as it stands is "not capable of earning a reasonable return." The term "reasonable return" is defined as "[a] net annual return of six per centum of the valuation of an improvement parcel [e.g., a landmark site]" (Section 207-1.0 (v)). When an applicant has made a demonstration of insufficient return, the Commission must attempt to devise a plan whereby the landmark may be preserved, and "also rendered capable of earning a reasonable return" (Section 207-8.0(b)). Such a plan can include, *inter alia*, partial or complete tax exemptions, remission of taxes, or authorization of alteration, construction, or reconstruction that will preserve the special features of the landmark but at the same time improve the site's profitability. If tax adjustments alone cannot alleviate the landmark owner's difficulty, any plan devised by the Commission must be submitted for the applicant's approval. If the Commission fails to devise an acceptable plan, it may, within a ten-day period, "transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel \* \* \*" (Section 207-8.0(g)). If no such recommendation is made, or if such a recommendation is made and the city does not follow it within 90 days, the Commission must issue the applicant a notice to proceed with the demolition or alteration originally proposed.

Because the site occupied by Grand Central Terminal already enjoys a partial real estate tax exemption under Section 489ff of the New York Real Property Tax Law, relating to commuter railroad real property, appellants could not invoke the procedure outlined above, by which property owners unable to earn a reasonable return on a landmark site may obtain relief under the Landmarks Preservation Law. In the New York courts, appellants tried to show that they were incapable of earning a reasonable

lants alleged that the designation of the Terminal as a landmark and the accompanying restrictions on the use of the Terminal's site constituted a taking of private property for public use without just compensation, in violation of the Fourteenth Amendment (A. 16-17). The Trial Term of the New York Supreme Court agreed, and it permanently enjoined the City and the Commission from preventing the construction of a building that would be lawful but for the Landmarks Law (J.S. App. 51a-73a). Although the reasons for the decision are not entirely clear, the court concluded that the Landmarks Law deprived Penn Central of substantial prospective rentals and stated (*id.* at 71a): "[S]urrounded as Grand Central is by the heavily travelled roadway around its perimeter on three sides, it leaves no reaction here other than that of long neglected faded beauty. The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers."

A divided panel of the Appellate Division of the Supreme Court reversed (J.S. App. 16a-50a). The majority reasoned that a regulation of uses of prop-

return on the Terminal site, as long as that site was occupied by the Terminal alone. They were unsuccessful in this endeavor (J.S. App. 13a-14a, 25a-27a) and do not pursue it in this Court (Br. 8 n. 7). Accordingly, the unavailability of the procedure described in Section 207-8.0 of the Landmarks Preservation Law had no deleterious effect on appellants' financial position, because appellants would have been unable to demonstrate the economic hardship necessary to activate the relief provisions of the statute even if they had been eligible.

erty is a "taking" only if the regulation deprives the owner of all beneficial use of the property. It stressed that the designation of the Terminal as a landmark does not interfere with its intended and primary use as a railroad terminal (*id.* at 24a, 48a) and found that Penn Central had not demonstrated that the Terminal is incapable of earning a reasonable return (*id.* at 25a, 49a-50a). Penn Central's submissions were flawed, the court explained, because they did not include an imputed rental value for the Terminal's facilitation of railroad activities. "Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal \* \* \*. The reasonable rental value of such [terminal] space cannot properly be omitted from any meaningful analysis of the property's capacity to yield a reasonable return" (*id.* at 25a). Because Penn Central had not demonstrated that the Terminal would be unprofitable even with rental income imputed for this purpose,<sup>11</sup> the court held that it had not carried its burden of demonstrating a taking.

The New York Court of Appeals unanimously affirmed (J.S. App. 1a-15a). The court first reasoned that there had been no taking because the designation of the terminal as a landmark did not deprive the owners of a reasonable return from their property (*id.* at 2a-6a). Then, exploring further the problems caused by landmark preservation laws, the court stated that it would require landmark designations

<sup>11</sup> The court stated (J.S. App. 26a; emphasis added): "At best, [appellants] have shown that they have been deprived of the property's most profitable use."

to leave owners with a "reasonable return" only on the privately contributed component of the property's value, not on the portion created by the efforts of society (*id.* at 6a-9a). The court then observed that the return on the Terminal as a transportation hub included some fraction of the return on appellants' nearby real estate holdings because appellants' "hotels and office buildings, would lose considerable value and deprive [appellants] of much income, were the Terminal not in operation" (J.S. App. 9a). Finally, the court remarked that appellants "have not been wholly deprived of the development rights above the Terminal" (*id.* at 11a). These development rights have been made transferable, and the court thought that this feature of the City's program helped establish that appellants had been treated fairly (*id.* at 11a-14a).

#### SUMMARY OF ARGUMENT

In order to promote the general welfare, federal, state, and local governments may regulate the use of private property. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365. The scope of legislative discretion in this area is broad, and economic regulations enjoy a presumption of constitutionality. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15. Furthermore, historic preservation is a valid objective of governmental regulation. *United States v. Gettysburg Electric Ry.*, 160 U.S. 668; *City of New Orleans v. Dukes*, 427 U.S. 297, 304.

In purpose and effect, New York City's Landmarks Preservation Law is similar to common zoning ordi-

nances that have been approved by this Court. *Village of Euclid v. Ambler Realty Co.*, *supra*; *Goldblatt v. Town of Hempstead*, 369 U.S. 590. By its nature, historic preservation requires the identification and protection of individual sites and structures of unusual historic value. Accordingly, the fact that New York City's law has created a comprehensive program for the preservation of landmarks located not in a single district but at different places throughout the City does not mean that the law as applied to Grand Central Terminal is constitutionally infirm.

The unique features of Grand Central Terminal justify its designation as an historic landmark. Appellants concede this point. The designation permits continued use of the Terminal as a railroad station, the function it has served since its opening in 1913. New York City's action thus does not deprive appellants' property of all reasonable beneficial use. Moreover, the state courts have found that appellants have not demonstrated their inability to earn a reasonable return on their investment in the Terminal (J.S. App. 25a-26a, 49a-50a). Appellants accept this finding as well (Br. 8 n. 7). That should be dispositive. Under the principles established in *Goldblatt v. Town of Hempstead*, *supra*, a land use regulation that serves a substantial public purpose and allows a reasonable use of property is valid.

Appellants' claim that New York City has completely taken the "air rights" above Grand Central Terminal is unpersuasive. Almost any regulation of uses may be characterized either as a partial taking

of an entire piece of property or a complete taking of part of that property. Appellants' verbal manipulation does not distinguish this case from earlier decisions in which this Court sustained regulations that totally prohibited industrial uses (*Village of Euclid v. Ambler Realty Co.*, *supra*), excavation below a certain level (*Goldblatt v. Town of Hempstead*, *supra*), and building above a specified height (*Hudson County Water Co. v. McCarter*, 209 U.S. 349).

#### ARGUMENT

#### NEW YORK CITY'S LANDMARKS PRESERVATION LAW DOES NOT "TAKE" GRAND CENTRAL TERMINAL WITHOUT JUST COMPENSATION

##### A. A REGULATION OF USES IS NOT A TAKING UNLESS IT DEPRIVES THE PROPERTY OF ANY REASONABLE USE

1. In order to promote the general welfare, federal, state, and local governments may regulate the use of private property. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Goldblatt v. Town of Hempstead*, 369 U.S. 590. The discretion accorded to legislative bodies is broad, and it is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15. Use restrictions are constitutional unless they do not "bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow v. City of Cambridge*, 277 U.S. 183, 188. And

"the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 n. 6 (plurality opinion).<sup>12</sup>

One of the legitimate concerns of governmental regulation is historic preservation. Appellants concede as much (Br. 12), and this Court has acknowledged that governments may pursue historic, aesthetic, and cultural objectives. See *United States v. Gettysburg Electric Ry.*, 160 U.S. 668; *Berman v. Parker*, 348 U.S. 26, 31-33; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9; *City of New Orleans v. Dukes*, 427 U.S. 297, 304. Historic preservation laws have been enacted by all 50 states and by more than 500 municipalities.<sup>13</sup> National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976). State and lower federal courts have uniformly held that historic preservation is an appropriate goal of land use regulation, although in some instances particular applications of state or local laws have not survived judicial scrutiny. See the cases cited in Appellees' Br. 11 and in National Trust for Historic Preservation Br. 22 n. 29.

Appellants do not now question the designation of Grand Central Terminal as an historic landmark. Appellants expressed some doubts on this score in their complaint (A. 13), but they have abandoned any contention that the decision to classify the Terminal as a landmark was improper. Appellants did not seek

<sup>12</sup> See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73-82 (Powell, J., concurring).

<sup>13</sup> See also the Appendix, *infra*, pp. 1A-9A.

judicial review of the designation when it was made in 1967, and the determination of the New York City Landmarks Preservation Commission was entirely justified.<sup>14</sup> Indeed, on January 17, 1975, Grand Central Terminal was entered in the National Register of Historic Places and was designated a national historic landmark. 41 Fed. Reg. 5914, 5989.

2. The law at issue in this case establishes a comprehensive citywide program for the identification

<sup>14</sup> The design and execution of Grand Central have won extensive acclaim (see notes 1 and 5, *supra*), and the consensus of the critics is that the Terminal's place in the architectural history of New York City is assured. In a review of a pictorial exhibition that featured Grand Central Terminal, the Fifth Avenue Library, and the original version of the Times Tower, the architectural critic of the *New York Times* wrote:

"All three buildings straddle the 19th and 20th centuries. They are all examples of progressive planning and formal, academic style. And all profoundly affected the character and development of their surroundings. Together \* \* \* they are responsible to a large degree for the form and content of midtown Manhattan. And they have continued to serve practical and symbolic purposes well into our own time. They are, in fact, much more than buildings; these three are New York icons, touchstones of its identity, generators of function and legend, a part of the city's soul.

\* \* \*

"When the Terminal was built, between 1898 and 1913, it \* \* \* was the result of consolidated growth and a grand civic gesture. The brilliantly functional, intricately related, multi-level plan, with the Terminal built over the tracks, was connected by pedestrian routes and 'circumferential drives' to the circulation of the area and the large-scale development around the station. It is one of the most stunning achievements in the history of urban design.

"Ramps, passageways, subways, shops, services and offices all converge on one of the greatest interior spaces of [New York] or any other city, the Grand Concourse—125 feet high to its star-studded, once blue, vaulted ceiling." *New York Times*, October 19, 1975, § 2, p. 32, col. 1.

and preservation of historic structures.<sup>15</sup> The statute's purposes and effects are quite like those of common zoning ordinances that are unquestionably permissible. See *Village of Euclid v. Ambler Realty Co.*, *supra*; *Goldblatt v. Town of Hempstead*, *supra*. Zoning ordinances typically are designed to improve the quality of life by concentrating certain kinds of enterprises in limited areas and separating incompatible land uses. In recognition of the fact that New York City's Landmarks Preservation Law does not move historic structures and gather them in a particular area of the City, the New York Court of Appeals acknowledged that this case does not involve zoning in the usual sense (J. S. App. 4a). Nevertheless, for purposes of the constitutional issue presented here, the zoning analogy is apt.

The point of New York City's law and of the federal statutes (Appendix, *infra*, pp. 1A-9A) is that some properties, wherever located, deserve special treatment in order to preserve and improve the quality of life in the City as a whole. This effect on the quality of life may be present whether a number of such buildings are located together in a single historic district (see, e.g., *Maher v. City of New Orleans*, 516 F. 2d 1051 (C.A. 5), certiorari denied, 426 U.S. 905) or are dispersed throughout a city, state, or nation.

<sup>15</sup> By November 1977 more than 400 historic structures in all of New York's five boroughs had been designated by the City's Landmarks Preservation Commission. Landmarks Preservation Commission of the City of New York, *Landmarks and Historic Districts* (1977).

Although the designation of particular buildings as landmarks may create opportunities for arbitrariness not present in broad-area zoning, by the opportunity to challenge a determination that a particular structure or group of structures has special historic or architectural value is an effective safeguard against arbitrary government action. Appellants did not challenge the designation of Grand Central Terminal as a landmark, and so they are in no position to argue that they were injured by arbitrary or unprincipled action. The decision that the Terminal is a landmark would be unassailable in any event. It is, as the court of appeals said, "no ordinary landmark" (J.S. App. 7a).

3. Under the principles established in *Goldblatt v. Town of Hempstead*, *supra*, once it has been established that a regulation serves a substantial public purpose, the only open question is whether the regulation obliterates any beneficial use of the property. Appellants do not raise the beneficial use question here and could not reasonably do so. The landmark designation does not affect the use Grand Central Terminal has had since its inception. It was, and will continue to be, a railroad terminal containing office space and concessions (J.S. App. 24a, 48a). The designation of the Terminal as a landmark *changes* nothing; it means only that appellants are inhibited from making alterations to the exterior of the building.

Moreover, the state courts found as a fact that appellants had not demonstrated that they are unable to earn a reasonable return on their investment in the

Terminal (J.S. App. 25a-26a, 49a-50a). Appellants accept that finding (Br. 8 n. 7) and do not challenge the conclusion that they have the burden to demonstrate that the designation deprives them of a reasonable return.<sup>16</sup> That should be the end of this case.

Appellants contend, however, that the value of property depends on the return it can bring, and that state action reducing the return (here the yearly rentals) must to that extent deprive the property of its reasonable return. The contention is circular.<sup>17</sup> Whether or not it is possible to devise talismanic definitions of reasonable return and reasonable beneficial use of property, the appropriate disposition of an argument that a regulation amounts to a taking must depend more on the social and economic realities of a particular situation than on any analysis of words and phrases. Certainly the fact that appellants may receive a reasonable return on their net investment in

<sup>16</sup> This burden follows directly from the presumption of constitutionality afforded to legislative and administrative acts. See, e.g., *Usery v. Turner Elkhorn Mining Co.* *supra*, 428 U.S. at 15.

<sup>17</sup> See generally *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601: "The heart of the matter is that [the measure of reasonable return] cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." Consequently, the Court held, a regulated supplier of gas is entitled to a fair return only on investment, not on "value" abstractly computed. The same principle applies here.

the Terminal is a strong point in favor of the law's validity.<sup>18</sup>

<sup>18</sup> Appellants have concentrated a major segment of their attack (Br. 16-19) on the aspect of the New York Court of Appeals' decision that suggests that, in calculating the value of the property on which appellants are entitled to earn a reasonable return, the publicly created component of the property's worth must be excluded. In *United States v. Fuller*, 409 U.S. 488, 492, this Court acknowledged that, at least in some circumstances, "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created \* \* \*."

Appellant railroads have benefited to a notable extent from public largesse in connection with Grand Central Terminal. Most important, New York City's decision to permit the placement of a station and tracks under public streets in midtown Manhattan has enabled the Terminal to flourish and has greatly enhanced the value of Penn Central's surrounding properties. Appellants argue that virtually any piece of property derives a significant portion of its value from its place within the social order and that therefore the New York Court of Appeals erred in attempting to remove from consideration that fraction of the Terminal's value attributable to the efforts of society at large.

We, too, believe that it would be pointless in most cases to attempt to separate the value of property contributed privately from the value added by the benefits of living in society; property has value only in relation to its surroundings and the legal rules for enforcing private rights. Moreover, some of the public contributions to the Terminal may best be understood as subsidies in exchange for railroad services that otherwise would not have been provided (or would have been provided only at higher rates). To the extent this was true, the largesse bestowed on Grand Central Terminal has inured to the benefit of the public, not of appellants; the public contributions are the equivalent of "payment" to appellants for benefits appellants distributed to the public, and it is too late for the City to "take back" its contributions by disregarding them in determining the value of the Terminal on which appellants are entitled to a reasonable return.

Still, there are present public benefits (such as tax exemptions) that must be considered in determining whether the net effect of

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The observation is now commonplace that many of the familiar terms of property law are less than helpful. Cases where courts have been asked to decide whether governmental action has effected a "taking" of private property have generated more than their share of linguistic rather than functional analysis.<sup>19</sup>

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the City's dealings with appellants amounts to a taking. It is not necessary to embrace fully the approach of the New York court in order to sustain its result. The simple fact is that the state courts found that appellants did not prove they could not earn a reasonable return if they continued to operate the Terminal as a train station only, without the proposed office building, and appellants do not contest that finding.

<sup>19</sup> Compare, e.g., Mr. Justice Holmes' opinion for the Court and Mr. Justice Brandeis' dissenting opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393. The Court reviewed a state statute forbidding the mining of coal in such a manner as to cause the subsidence of any structure used as a human habitation. The Court held that the law resulted in a taking of private property. The majority opinion stated (260 U.S. at 413, 415-416):

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits \* \* \*. So the question depends upon the particular facts. \* \* \*

\* \* \* \* \*

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. \* \* \* [T]his is a question of degree—and therefore cannot be disposed of by general propositions."

Mr. Justice Brandeis responded (*id.* at 417):

"Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in

Courts and commentators have identified a variety of factors that appear to have special significance. There is more likely to be a "taking" if an actual physical invasion of property has occurred, because that *transfers* the use of property from one person to another. Compare, e.g., *United States v. Causby*, 328 U.S. 256, and *Griggs v. Allegheny County*, 369 U.S. 84, with *Batten v. United States*, 306 F. 2d 580 (C.A. 10), certiorari denied, 371 U.S. 955 (compensability of diminution in property value depends on whether aircraft causing harm fly over or only alongside affected property). Appellants rely on *Causby* and *Griggs*, but there was no transfer or invasion here.<sup>20</sup>

question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public."

See also Mr. Justice Frankfurter's declaration for the Court in *United States v. Dickinson*, 331 U.S. 745, 748:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

This formulation begs the question of when "a servitude has been acquired."

<sup>20</sup> See also *South Terminal Corp. v. Environmental Protection Agency*, 504 F. 2d 646, 678-679 (C.A. 1): "The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. \* \* \* [N]o taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. \* \* \* Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular way may be transferred from the original owner to another person, or to a

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The takings cases present difficult judgmental problems because almost any governmental regulation that arguably diminishes a property's value may be characterized with equal accuracy as a partial taking of the entire property, or a complete taking of part of the property. And even if the two could be distinguished it would be hard to understand why different compensation rules should apply. It is perhaps enough to say that taking cases must be decided according to a rough concept of fairness, where a "fair" outcome is one produced by a rule that gives appropriate recognition to both personal economic needs and the interests of society. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1219, 1226 (1967). Finer tuning, Professor Michelman suggests, can be achieved only through legislation.

The New York City Landmarks Preservation Law is just such a legislative attempt to provide additional assurances of fairness to affected property owners. It guarantees a reasonable rate of return on properties designated as historic landmarks, except where such properties already enjoy certain kinds of tax exemptions.<sup>21</sup> It establishes detailed procedures to harmonize

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governmental body. Only the second and third situations are thought of as takings today."

<sup>21</sup> The requirement that just compensation be paid for a taking often serves (i) to protect a person from conscription of his assets in an unfairly high ratio for the benefit of the public at large, and (ii) to compel the government to make an informed choice whether the goal it seeks to pursue is worth as much to the public as the value of the property it must use or burden to

historic preservation needs and the desire of landmark owners to alter their property. In sum, the City's program as applied to Grand Central Terminal is a reasonable land use regulation directed toward a permissible governmental objective, and therefore it is not a taking for which the Fourteenth Amendment requires that just compensation be paid.<sup>22</sup>

achieve that goal and, if so, to induce the government to use the lowest-valued property that will enable it to achieve the public ends. Compare Posner, *Economic Analysis of Law* 40-44 (2d ed. 1977), with Ackerman, *Private Property and the Constitution* 113-167 (1977). But these foundations are substantially eroded, when applied to general regulatory programs, by the recognition that taxes and other governmental programs legitimately may redistribute income from some persons to others, even if the onus falls on a relatively small group and the benefits are spread quite widely. It may be helpful, therefore, to think of the landmark preservation program as a non-monetary tax levied on owners of landmarks for the benefit of the general public (including owners in that capacity). A "landmark tax" levied in money would be no more offensive to principles of equity than the thousands of other special purpose taxes. If a monetary landmark tax would be permissible, a non-monetary tax also should be; this suggests that there is nothing infirm in the City's program.

<sup>22</sup> Although New York's landmarks law would be valid without further adornment, the City has chosen to modify its concededly valid zoning resolution in order to permit owners to achieve some additional benefit from the fact that a particular parcel has been designated as a landmark. Zoning amendments have been adopted allowing the utilization of development rights ordinarily available on the Terminal site on other nearby sites, several of which are owned by Penn Central (see pp. 4, 6-7, *supra*). This is precisely the sort of legislative fine tuning envisaged by Professor Michelman as a rational response to the problems created by the need for effective land use regulation. For additional examples of legislative efforts to provide some redress for property "deprivations" that the courts would deem noncompensable, see, *e.g.*, the Uniform Relocation Assistance Act of 1970, 84 Stat. 1894, 42

(Continued)

B. THE REASONABLE USE CRITERION PERTAINS TO THE PARCEL OF PROPERTY AS A WHOLE AND NOT TO EACH ONE OF THE BUNDLE OF PROPERTY RIGHTS

It may be that appellants agree with most of what has been said above. They argue, however, that the designation of the Terminal as a landmark "took"

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U.S.C. 4601 *et seq.*, and the highway relocation assistance provisions contained in Section 30 of the Federal-Aid Highway Act of 1968, 82 Stat. 830, 23 U.S.C. 501 *et seq.*

We think that the transferable development rights under the City's law are best seen not as "compensation" for a "taking" but as a reasonable measure to ensure that development rights customarily associated with a parcel of property are not taken at all. To be sure, the City's program places substantial restrictions on the use of the rights, but, for the reasons discussed in the text, rules that make property difficult to use, or that substantially diminish its value, are not necessarily takings. Appellants' argument that the transferable development rights are not "just compensation" for a "taking" of the development rights over the Terminal thus misses the mark.

If the transferable development rights are seen as "compensation" rather than as a measure of what was not taken, they would not be inadequate merely because they are not money. "[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-151; footnote omitted. See also *Bauman v. Ross*, 167 U.S. 548. Appellants' argument that no quantity of transferable development rights could satisfy the requirement of just compensation therefore is incorrect. (The *Regional Rail* cases upheld the constitutionality of the Regional Rail Reorganization Act of 1973, 87 Stat. 986, as amended, 45 U.S.C. (Supp. V) 701 *et seq.* Valuation proceedings under the Act, in which appellant Penn Central is a party, are now pending. Issues regarding the form of payment may arise in those proceedings, and the United States urges this Court to avoid any statement in this case that might have unintended consequences in the Rail Act proceedings.)

all of the "air rights" above the building. Thus, they say, the designation did not simply restrict the uses of the property or require the property to be devoted to a lower-valued use; the designation took the air rights altogether, prohibiting any gainful use of them.<sup>23</sup>

This argument glides over the intractable problem of separating a partial taking of the whole from the whole taking of a part. See page 24, *supra*. It is no more accurate to say that the landmark designation took all of the air rights, leaving no gainful use of them, than it is to say that the designation took only a few of many gainful uses of the entire parcel, leaving the dominant gainful use of the parcel as a railroad terminal unaffected. Both statements are true. Any regulation can be characterized as a "total" taking of the thing prohibited.

So, here, the effect of the landmark designation is totally to prohibit the use of the air space over the Terminal, which itself rises more than 200 feet above ground level. In *Village of Euclid v. Ambler Realty Co.*, *supra*, the zoning ordinance totally prohibited use of the property for industrial purposes, decreasing the value of the land by approximately 75 percent. In *Goldblatt v. Town of Hempstead*, *supra*, the town's ordinance prohibited excavation below the water table, completely depriving the owners of the right

<sup>23</sup> This characterization by appellants is not entirely accurate, because the development rights were made transferable. See note 22, *supra*. We need not rely here, however, on the transferability of the development rights.

to continue using the land as a sand and gravel pit. Courts consistently have sustained "setback" statutes, which prohibit an owner from building out to the borders of his land.<sup>24</sup> And there never has been a serious constitutional question about the validity of maximum building height regulations. As the Court stated in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355: "[T]he police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."<sup>25</sup>

It is therefore unavailing to attempt to carve up a parcel of property into discrete "rights" and to attempt to determine whether one of those rights has been "totally" taken by the regulation. We know

<sup>24</sup> See, e.g., *Headley v. City of Rochester*, 272 N.Y. 197, 5 N.E. 2d 198; *State ex rel. Miller v. Manders*, 2 Wis. 2d 365, 86 N.W. 2d 469.

<sup>25</sup> The Court also said, in a passage that has been repeated many times (209 U.S. at 355): "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula \* \* \*."

from decided cases that regulations may, without compensation, prevent buildings or other activities from going up (*Hudson County*), down (*Goldblatt*) or out (the setback cases). Each of these cases involved a complete restriction on some, but not all, of the bundle of rights associated with a parcel of property. And in each the question was the same: was what was left enough to permit reasonable, beneficial use of the property?

In the present case appellants have not challenged the finding of fact that there are reasonable, beneficial uses for the Terminal. And they have not even been deprived "totally" of the air rights over the land. They overlook the fact that the Terminal itself is many stories high. They have been "deprived" only of the right to go higher. But every height limitation takes away the right to go higher, as the regulation in *Goldblatt* took away the right to go lower. It is impossible to accept appellants' attempt to focus attention on the particular inhibitions worked by the regulation without overruling *Euclid* itself.

This attention to the uses of the entire bundle of rights is consistent with the decisions in regulated industry cases that the regulated entity need not be allowed to earn a reasonable return on every component of investment; it is enough if the entity receives a reasonable return on the investment taken as a whole. So, for example, in *Atlantic Coast Line R.R. Co. v. North Carolina Corporation Commission*, 206 U.S. 1, the Court upheld against constitutional challenge

an order to a railroad to run an additional train at a loss, concluding that calculations of gain and loss, and of reasonable return, must be made with respect to "the nature and productiveness of the corporate business as a whole" (206 U.S. at 27). And the result was the same when a utility sought to abandon an unprofitable service; the Court held that abandonment need not be permitted as long as the company was earning an adequate return on its total investment. *Puget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574.<sup>26</sup>

We do not suggest that the City can take appellants' property without just compensation simply because appellants still may be earning a profit. Although that is the teaching of the rate regulation and abandonment cases, it cannot apply with full force when the owner is not subject to a unified system of regulation. The Penn Central, although subject to both state and

<sup>26</sup> Similar examples are legion. See, e.g., *Southern R. Co. v. North Carolina*, 376 U.S. 93; *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, on rehearing, 282 U.S. 187; *Colorado v. United States*, 271 U.S. 153; *Western & Atlantic R.R. v. Georgia Public Service Commission*, 267 U.S. 493; *Chesapeake & Ohio Ry. Co. v. Public Service Commission*, 242 U.S. 603; *New York and Queens Gas Co. v. McCall*, 245 U.S. 345; *Northwestern Pacific R.R. Co. v. United States*, 228 F. Supp. 690 (N.D. Cal.), affirmed, 379 U.S. 132. Only the recognition that the return to the enterprise as a whole is what counts allows regulatory commissions to require regulated enterprises to engage in cross-subsidization—the reduction of prices to some customers and for some services (so that they may be encouraged) offset by increases elsewhere. Cross-subsidization is a characteristic feature of modern regulation. See generally Posner, *Taxation by Regulation*, 2 Bell J. of Econ. & Mgt. Sci. 22 (1971).

federal regulation in many ways, is not "regulated" by the Landmarks Commission. But these cases indicate that investments and property rights cannot easily be carved up for "takings" purposes, and they reinforce the submission that, as long as the Terminal still earns a reasonable return when put to its intended use, the argument that some discrete part of the original bundle of rights has been made worthless is immaterial.

#### CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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## APPENDIX

### FEDERAL PROGRAMS TO PRESERVE HISTORIC SITES AND STRUCTURES

Congress has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. They fall into three categories: (1) regulation of government-owned landmarks and historic places; (2) imposition of a requirement that historic preservation values be considered in the planning and performance of activities conducted under federal auspices; and (3) active participation in efforts intended to assist historic preservation.<sup>1</sup>

The first kind of provision, by definition, does not take private property. The leading statute of this sort demonstrates that congressional concern for historic preservation is not of recent vintage. The Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. 431-433, authorizes the President to designate historic landmarks, historic structures, and other objects of historic interest situated upon lands owned or controlled by the government as national monuments. The statute also made it a misdemeanor to appropriate, injure or destroy any historic or prehistoric ruin or monument on federal lands.

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<sup>1</sup> For a useful review of federal historic preservation legislation see Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law and Contemp. Prob. 314 (1971).

The second variety of federal statutes requires historic preservation to be considered in assessing the merits of proposed federal programs and in choosing a method of implementation once such programs have been adopted. For example, in the National Environmental Policy Act of 1969 ("NEPA"), 83 Stat. 852, 42 U.S.C. 4331(b)(4), Congress declared that "it is the continuing responsibility of the Federal Government to use all practicable means \* \* \* to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may \* \* \* preserve important historic, cultural, and natural aspects of our national heritage." Federal officials thus must consider potential effect on historic resources in connection with major federal actions. See 42 U.S.C. 4332. The Urban Mass Transportation Act of 1964 contains a similar provision. 78 Stat. 308, as amended, 49 U.S.C. 1610.

Other statutes are more specific. The Department of Transportation Act, 80 Stat. 933, as amended, 49 U.S.C. 1653(f), provides that the Secretary of Transportation "shall not approve any program or project which requires the use of \* \* \* any land from an historic site of national, State, or local significance as so determined by [the appropriate Federal, State, or local officials] unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such \* \* \* historic site resulting from such use." See also 23 U.S.C. 138.

An additional illustration of the second type of federal statute dealing with historic preservation is Section 102(a)(1) of the Public Buildings Cooperative Use Act of 1976, Pub. L. 94-541, 90 Stat. 205, to be codified at 40 U.S.C. (1976 ed.) 601(a)(1). Under that

provision, the Administrator of General Services, in managing and acquiring space for federal agencies, must "acquire and utilize space in suitable buildings of historic architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives."

The third group of federal laws includes those statutes that authorize federal acquisition of historic sites and promotion of historic preservation efforts initiated outside the federal government. Three of these statutes together form the basis for a comprehensive and cooperative system of identification and protection of historic resources.

The Historic Sites, Buildings and Antiquities Act of 1935, 49 Stat. 666, as amended, 16 U.S.C. 461-467, requires the Secretary of the Interior to "[m]ake a survey of historic \* \* \* sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorative or illustrating the history of the United States" (16 U.S.C. 462(b)). The Secretary was further charged with the task of restoring, preserving, and maintaining such properties, either through acquisitions in the name of the United States (16 U.S.C. 462(d)) or through cooperative arrangements with states, municipalities, corporations, associations, and individuals (16 U.S.C. 462(e)). The Secretary has designated more than 1,500 national historic landmarks. See 43 Fed. Reg. 5162-5336.

In order to facilitate public participation in historic preservation, Congress created the National Trust for Historic Preservation in 1949 (63 Stat. 927, as amended, 16 U.S.C. 468-468d.). The National Trust is a charitable, educational, non-profit corporation, established to receive donations of historically significant properties, to preserve and administer

these properties, and to accept gifts for use in carrying out the preservation program. The nine-member Board of Trustees includes the Attorney General, the Secretary of the Interior, and the Director of the National Gallery of Art (16 U.S.C. 468b). The National Trust has more than 121,000 contributing members, including approximately 1,500 local and regional organizations involved in historic preservation. National Trust for Historic Preservation Br. 2.

The National Historic Preservation Act of 1966, 80 Stat. 915, as amended and added, 16 U.S.C. (1976 ed.) 470-470t, is the most important of the federal statutes. Congress determined that desirable historic preservation could be achieved only through new federal programs that complement private initiative and the efforts of state and local governments (16 U.S.C. 470(d)). See H.R. Rep. No. 1916, 89th Cong., 2d Sess. 6 (1966):

Notwithstanding the progress which has been made with regard to historic preservation, most existing Federal programs and criteria for preservation are limited to natural and historical properties determined to be "nationally significant." Only a limited number of properties meet this standard. Many others which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball. Some of them are not even known outside of a small circle of specialists. It is important that they be brought to light and that attention be focused on their significance whenever proposals are made in, for instance, the urban renewal field or the public roads program or for the construction of Federal projects or of projects under Federal license that may involve their destruction. Only thus can a

meaningful balance be struck between preservation of these important elements of our heritage and new construction to meet the needs of our ever-growing communities and cities.

Congress authorized the Secretary of the Interior to maintain an expanded "national register of districts, sites, buildings, structures, and objects significant in American history," and to grant funds to states for the preparation of comprehensive statewide historic surveys and plans for the preservation of historic properties (16 U.S.C. 470a(a)(1)). The statute also authorizes the Secretary to establish programs of matching grants-in-aid to the states and to the National Trust for Historic Preservation. These grants may be awarded to states only for preservation projects developed in accordance with a comprehensive statewide historic preservation plan approved by the Secretary (16 U.S.C. 470b(a)(2)). Approximately 15,000 properties are listed on the National Register of Historic Places.<sup>2</sup> Approximately 1,400 of these are historic districts; the remainder are individual properties.<sup>3</sup>

The 1966 Act also created the Advisory Council on Historic Preservation (16 U.S.C. 470i). The Council advises the President and Congress on historic preservation, recommends measures to coordinate historic

<sup>2</sup> The complete National Register of Historic Places, as of December 31, 1977, appears at 43 Fed. Reg. 5162-5336.

<sup>3</sup> Most properties are entered in the National Register on the basis of nominations by a state. The nominating procedures are published in 36 C.F.R. Part 60. A state nominating a private property for listing in the National Register must notify the property owner of the nomination and allow a reasonable opportunity for written comment. The notification must inform the property owner of the federal tax consequences that may result from listing in the Register (see pp. 6A-7A, *infra*).

preservation activities, consults with state and local governments in the drafting of historic preservation legislation, and assesses the effects of tax policies on the achievement of historic preservation goals. The Council must be afforded an opportunity to comment on any federally funded or federally licensed undertaking that may affect a property included in or eligible for inclusion in the National Register. 16 U.S.C. 470f; see also Executive Order 11593, 36 Fed. Reg. 8921.<sup>4</sup>

Several more specific statutes encourage historic preservation. Foremost among these are four sections added to the Internal Revenue Code by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520. Section 191 of the Code (26 U.S.C.), offers an accelerated depreciation deduction for amounts expended in the rehabilitation of historic structures. Such improvements may be amortized over a five-year period, even if their useful life is considerably longer. Similarly, Section 167(o) allows a person who acquires and substantially rehabilitates historic property to depreciate that property on an accelerated basis, even though, ordinarily, a new owner of used nonresidential property must calculate depreciation according to the straight-line method.<sup>5</sup>

While Sections 191 and 167(o) provide incentives for rehabilitation, Sections 280B and 167(n) discour-

<sup>4</sup> The Council's procedures governing the required agency consultation on proposed federal actions are published as 36 C.F.R. Part 800.

<sup>5</sup> "Substantially rehabilitated" property is property for which the capital expenditures incurred during the 24 months ending on the last day of the taxable year, decreased by allowable depreciation or amortization, exceed the greater of \$5,000 or the adjusted basis of the property.

age demolition of historic structures. Under Section 280B(a)(1), no otherwise allowable deduction is permitted for amounts expended for such demolition, for the remaining undepreciated basis of the demolished structure, or for other resulting losses. Deductions thus denied may not be included in the depreciable basis of any replacement building; they must be charged to the capital account of the land on which the demolished structure was located. See 26 U.S.C. 280B(a)(2); S. Rep. No. 94-1236 (H.R. Rep. No. 94-1515), 94th Cong., 2d Sess. 504 (1976). Section 167(n) forbids the use of accelerated depreciation methods for new buildings erected on sites formerly occupied by historic structures.<sup>6</sup>

Under federal housing laws, as amended by the Model Cities Act of 1966, 80 Stat. 1278-1281, historic and architectural preservation should be considered in the development of urban renewal plans, and federally funded urban renewal projects may include the restoration of properties of historic or architectural value and the relocation of structures that will be restored and maintained for historic purposes. See 42 U.S.C. 1460(b), (c)(9)-(10). The Secretary of Housing and Urban Development is authorized to make grants to assist local governments in conducting surveys of the historic sites and structures in their areas. 40 U.S.C. 460(i). The Secretary also may award federal funds to state and local bodies for the acquisition and development of urban land that has value for historic, architectural, or scenic purposes. 42 U.S.C. 1500a(a), 1500d-1. And, under the 1974 amendments to the National Housing Act, 88 Stat.

<sup>6</sup> See generally Note, *State and Federal Tax Incentives for Historic Preservation*, 46 U. Cin. L. Rev. 833, 835-839 (1977).

1366, the Secretary is empowered to insure loans issued for the purpose of financing the preservation of historic structures. 12 U.S.C. 1703(a).

The Amtrak Improvement Act of 1974, 88 Stat. 1533, 49 U.S.C. (Supp. V) 1653(i), directs the Secretary of Transportation to provide financial, technical, and advisory assistance for preserving railroad passenger terminals and converting them into intermodal transportation facilities or civic and cultural activities centers. In distributing federal aid under this statute, the Secretary is to accord a preference to railroad terminals listed on the National Register of Historic Places or recommended by the Advisory Council on Historic Preservation. The United States may pay 60 percent of the total cost of a terminal preservation project covered by the Act.

The Historical and Archeological Preservation Act of 1974, 88 Stat. 174, as amended, 16 U.S.C. (1976 ed.) 469-469c, establishes a procedure for the preservation of historical or archeological data, the continued existence of which is threatened by a federally funded or licensed construction project. The statute authorizes the Secretary of the Interior to conduct survey, recovery, and protective operations on non-federal lands, with the consent of all parties having a legal interest in the property involved. If he undertakes such measures, the Secretary must compensate any party damaged as the result of construction delays or temporary loss of land use.

Congress has prohibited new surface coal mining operations that "will adversely affect any publicly owned park or places included in the National Register of Historic Sites [*sic*] unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the

historic site." Pub. L. No. 95-87, Section 522(e)(3), 91 Stat. 509, to be codified at 30 U.S.C. (1972 ed.) 1272. This statute, the Surface Mining Control and Reclamation Act of 1977, also allows some surface areas to be designated as unsuitable for certain types of surface coal mining operations if those operations could affect historic lands and "result in significant damage to important historic \* \* \* values" (Pub. L. 95-87, 91 Stat. 507-508).

Finally, if the Secretary of the Interior finds that surface mining activity may harm an historical landmark, he must notify the person conducting such activity and submit to the Advisory Council on Historic Preservation a report and a request for advice on ways in which to abate the activity or mitigate its impact. Pub. L. 94-429, 90 Stat. 1343, 16 U.S.C. (1976 ed.) 1908(a). By September 1978 the Council must submit to Congress a report on the actual or potential effects of surface mining on natural and historical landmarks and recommendations for appropriate protective legislation. 16 U.S.C. (1976 ed.) 1908(b).

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# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1977

**No. 77-444**

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGB  
PROPERTIES, INC.,  
*Appellants,*

vs.

THE CITY OF NEW YORK, et al.,  
*Appellees.*

On Appeal from the Court of Appeals of New York

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**  
**and**  
**BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS**  
**ON BEHALF OF PACIFIC LEGAL FOUNDATION**

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN  
SUPPORT OF APPELLANTS ON BEHALF OF  
PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation requests permission to  
file an *amicus curiae* brief because it firmly believes  
that the decision of the Court of Appeals of New  
York reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914,  
and 366 N.E.2d 1271 (1977), upholding the applica-

tion of the New York City Landmarks Preservation Law to appellant Penn Central Railroad's Grand Central Terminal without just compensation is contrary to the most fundamental constitutional concepts protecting the individual's right to own and use property.

The decision of the court below, substantially erodes the very underpinning of a property rights system in a free society which requires that compensation be provided an individual whose property has lost all reasonable use and productivity because of government regulations. The New York Court of Appeals, in an attempt to promote societal preferences for preservation of historic monuments, would qualify the right to compensation on principles never before recognized by this or any other court. The right to compensation would, among other things, be dependent on: (1) the economic status of the governmental regulator and its ability to pay; (2) the purpose of the regulation, be it for society's benefit or otherwise; and (3) the setting in which the property is located and its value apart from "society's" contributions.

Of grave concern to the Foundation is the fact that the decision of the New York Court of Appeals shifts the entire burden of preserving historic monuments for the good of society to the private property owner. Such burden not only violates the Fifth Amendment which guarantees that private property not be taken for a public use without just compensation, but violates basic concepts of equity and fairness. Extension and application of the New York

court's decision to situations beyond the preservation of historic monuments, the Foundation believes, is detrimental to the public interest.

It is with these concerns that Pacific Legal Foundation respectfully requests that it be permitted to address the issues posed by the decision of the New York Court of Appeals herein by filing the annexed brief *amicus curiae* so that the issues as they affect the private property owner, be he corporate or individual, may be fully and completely addressed.

Respectfully submitted,

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January, 1978.

**In the Supreme Court**

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**INTEREST OF AMICUS**

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest.

*Amicus* is particularly concerned with the preservation of our free enterprise system and protection of private property.

The broad question before this Court is the measure of protection which the law affords to an individual against the oppressive and discriminatory exercise of the police power by way of regulatory action severely limiting the use of property. The specific regulatory activity brought into question in this proceeding is set forth in the facts as stated in the opinion of the court below. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324 (1977). Those facts provide an account of appellant's attempt to make a reasonable use of its property and the substantial damage incurred as a result of a governmental decision to retain it in its nonprofitable form so that other citizens may benefit from its continued existence as a historic landmark. *Amicus* contends that where a land use regulation coupled with a purpose to enhance government resources singles out one property and becomes so burdensome to its owner as to be oppressive it should be viewed as confiscatory, arbitrary, and discriminatory.

Such regulation is not only contrary to basic principles of fairness, but it is most inefficient from a social and economic viewpoint in a free society.

In a broad sense, the damage wrought from excessive use of regulation is seen not only in terms of loss of property values to the individual directly affected, but also in economic dislocations to the community. Those dislocations include, for example, hardships on

the consumer who seeks housing in an overpriced and understocked market.

Under a system where an individual's property is subject to excessive governmental restrictions, ownership of land constitutes an exceedingly high risk. The increasing risks incident to property ownership have the potential to make investment in land less attractive, with the ultimate result of higher development costs and higher prices imposed by those who have assumed such risks. The risk is ultimately passed on to consumers whether it be the retailer seeking commercial space in a shopping center or the individual in search of affordable housing.

It is the interest of the public at large who must contend with market disequilibrium which *amicus* seeks to represent by way of its brief *amicus curiae*. Those interests are substantial.

It is the position of *amicus* that the appellants have proved a violation of a constitutional right guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

In analyzing the questions posed, *amicus* submits that fairness and considerations of public policy should guide the Court. *Amicus* urges the Court to shun any mechanical reliance on labels when considering whether compensation is indeed warranted by the regulatory elimination of all reasonable use of appellant's property.

*Amicus* urges this Court to recognize that the benefits of a governmental enterprise that are shared by

the community at large be paid by the community at large. The question of whether it is too costly for government to pay for its projects is no excuse for requiring such cost to be borne by a single property owner in contravention of its constitutional rights.

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#### OPINION BELOW

The opinion of the New York Court of Appeals is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914, and 366 N.E.2d 1271 (1977).

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#### ARGUMENT

##### I

#### INTRODUCTION

In the last fifty year this Court has rarely examined the constitutionality of a land use regulation in terms of a "taking" under the Fifth and Fourteenth Amendments. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It is for this reason that modern land use regulatory controls should be examined so as to provide guidance to government and landowners alike in their public and private planning.

Grand Central Station is the privately owned property of appellant Penn Central Transportation Company. It is not profitable or economically feasible to maintain or operate the station in its present form. Appellant desires to make economic and profitable use

of its property by developing the air space above its property for commercial use. However, the City of New York has prevented development so that the station and its site may be maintained in its present form as a historic monument. In spite of the fact that the property is privately owned, the city refuses to compensate appellant for its losses due to the regulatory limitation.

The trial court as finder of fact determined that all reasonable use of appellant's property has been denied by the regulatory activity. However, on the question of reasonableness, the highest court of New York added some additional "ingredients" to the formula for determining reasonableness and concluded that appellant under the new formula had failed to establish a taking of private property.

The new "ingredients" added by the New York court give rise to five issues:

1. Is society's contribution to the value of private property by virtue of its location in a community a factor in denying compensation to a property owner?
2. Is the economic status of the governmental agency a factor in denying compensation to a property owner?
3. Is the purpose of the land use regulation to preserve a historic monument a factor in denying compensation to a property owner?
4. Is the inclusion of the property owner's income from other real property assets a factor in denying compensation to a property owner?

5. Is the potential for receiving transferable development rights a factor in denying compensation to a property owner?

*Amicus* contends that each of the above factors was improperly applied by the New York Court of Appeals and that if such factors were applied uniformly to regulatory action of government, the whole concept of private property as we know it would be transformed into a form of socialized public ownership. It is this fundamental issue that makes this case take on a much greater significance than just the interests of appellants in this case.

*Amicus* will deal with each of the first three issues above and in order to avoid repetitive treatment joins in appellants' argument on the latter two.<sup>1</sup>

## II

### WHETHER OR NOT SOCIETY HAS CONTRIBUTED TO THE VALUE OF PRIVATE PROPERTY IS AN IMPERMISSIBLE BASIS FOR DENYING JUST COMPENSATION

The fundamental importance of property ownership as an incidence of our basic civil rights in society cannot be underestimated. This Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), made it clear that:

<sup>1</sup>The decision of the court below is somewhat confusing on the issue of transferable development rights. It is difficult to determine whether or not the opinion deals with the subject on the issue of whether or not there has been a taking or whether transferable development rights are a means of compensating an owner once a taking has been established.

"[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

The court below ruled that the attributes of ownership in Grand Central Station do not include the effects on value created by the efforts of society. This imponderable concept presents not only an appraisal nightmare, but it has no precedent in law. It is a sweeping emasculation of the most fundamental precepts of private property ownership. If this reasoning were applied to all private owners of property, it would indeed be difficult, if not impossible, to establish which part of the value of one's property belonged to the state and which part was his. Arguably, all of the value of one's property could be attributed to its setting in a community and therefore subject to total appropriation without compensation. Followed to a logical conclusion, private property, not unlike feudal tenure, would be subject to total governmental control far beyond that allowed by the Fifth Amendment of the Constitution. *McClaghry, Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D. L. Rev. 486 (1976).

The court below in its restrictive approach to what constitutes private property has simply indicated to

appellants that Penn Central does not have a right in what society has contributed to the value of its property, and therefore, no compensation is justified for its loss.

While it is simple to examine this case in terms of whether there is a property right, such an approach begs the question. The question to be answered is: In the governmental control over the use of private property, has there been a violation of a *constitutional* right? The designation of a property right is usually determined *only after* a judicial analysis is made of *where* the economic loss should fall. *Southern California Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 175 (1973). It is only after this determination that it can be said there is or is not a "taking" under the Constitution. Thus, to state that there has been a taking is no more than to state that compensation should be paid. As stated by Professor Arvo Van Alstyne:

"Inverse condemnation epitomizes a struggle between the security of 'established economic interests' and 'the forces of social change' which cannot be rationally resolved by a mere search for definitions." Van Alstyne, *Statutory Modification of Inverse Condemnation: Scope of Legislative Power*, 19 Stan. L. Rev. 727, 735 (1967).

Even though the judicial conclusion in a particular case may be masked by discussions of "property right," the outcome (at least in cases of first impression) usually is based on a weighing of complex policy considerations—seldom disclosed by the court. *Bacich v. Board of Control*, 23 Cal. 2d 343, 350 (1943).

In *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), Justice Jackson forthrightly recognized the actual issue stating:

"But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . . . We cannot start the process of decision by calling such a claim as we have here a 'property right'; *whether it is a property right is really the question to be answered*. Such economic uses are rights only when they are legally protected interests. . . ." (Citations omitted, emphasis added.)

More simply put by Justice Holmes:

"*The question at bottom is upon whom the loss of the changes desired should fall. . . .*" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416 (emphasis added).

In dealing with the issues in this case, therefore, it must be remembered that the bottom line still is: Who should absorb the loss? By putting the problem in this perspective, we avoid the rationalization that it is legitimate to sacrifice the individual because he never had a "property right" in the first place. Whether he had a property right is ultimately the question to be decided by the Court. The real issue is under what circumstances can society legally justify asking individual property owners to absorb losses inherent in governmental programs designed to benefit many.

*Amicus* submits that the purpose of the regulation herein and the benefits conferred upon the community by virtue of the historical landmark designation are compelling reasons for distributing the costs of such benefits to the community.

### III

#### THE ECONOMIC STATUS OF THE PUBLIC AGENCY IS IRRELEVANT TO THE DETERMINATION OF REASONABLENESS OF THE REGULATORY ACTIVITY

The court of appeals found that:

"In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable or even required." 366 N.E.2d 1271, 1278.

The court below is in effect saying that if government desires to make a public monument out of private property at substantial economic detriment, it should pay for the losses only if it can afford to do so. The court is saying that it is just to impose the cost of the public endeavor upon a single owner if society as a whole cannot afford to pay for it. This notion is not only contrary to basic ethics of fairness, it is unsupported by case law.

In *United States v. Fuller*, 409 U.S. 488, 490 (1973), this Court stated:

"The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." (See

also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967)).

If there was any doubt as to where this Court stands on where the loss should fall, it was dispelled in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), where this Court stated that:

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

It is clear that the economic status of the public agency is of no relevance to the issue of reasonableness of the taking.

In *Bacich*, 23 Cal. 2d at 350-51, the California Supreme Court considered a case wherein no property was physically taken and the only government action was to cul-de-sac a street. The court, in holding for compensation, analyzed the question as follows:

"[F]ears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost. [Citations omitted.] However, it is said that in spite of that so-called policy 'the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals. This (improvement) may be of great convenience to the public generally, but the properties of abutting owners ought not

be sacrificed in order to secure it'; and, quoting from Sedgwick on Constitutional Law: 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. . . .'

If a public agency refuses to pay for a public project, that fact alone places in doubt the importance of such an undertaking as a priority in relation to other projects. To justify the taking without compensation on the basis of inability to pay is to do no more than to rationalize confiscation by converting into public ownership that which was private ownership. Such socialization of property is impermissible under our Constitution. This subject was succinctly put in focus in a California appellate decision, *Midway Cabinet etc. Mfg. v. County of San Joaquin*, 257 Cal. App. 2d 181, 192 (1967), where the court stated:

"But in this context it has been stated by Professor Michelman (*op.cit.*, p. 1181); '[A]ny measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.'"

Putting it yet another way, one might ask whether we can afford a society which confiscates private property and allocates the loss disproportionately to the individual.

It is therefore submitted that the economic status of appellee should not have been a factor in reversing the trial court.

#### IV

**THE PURPOSE OF THIS GOVERNMENTAL REGULATION IS FOR PUBLIC RESOURCE ENHANCEMENT AND FOR THIS REASON SHOULD BE VIEWED AS AN IMPERMISSIBLE TAKING**

The court of appeals below appropriately noted the distinction between traditional zoning regulations where government acts in an arbitral capacity between competing land uses in a community and the type of regulatory control at issue in the instant case. The court noted that in traditional zoning, "each property owner in the zone is both benefited and restricted from exploitation, presumed without discrimination except for permitted continuing non-conforming uses." 366 N.E.2d at 1274. Whereas, in this case "the burden of the limitation is borne by a single owner." 366 N.E.2d at 1274. One of the grounds upon which the court justified shifting the loss to the private citizen was the fact that the "purposes behind the regulation assume considerable significance." 366 N.E.2d at 1274. Indeed, the court noted that the "cultural, architectural, historical or social significance" (366 N.E.2d at 1275) attached to the parcel was an acceptable reason for singling Penn Central out for less favorable treatment than the victims of other types of discriminatory zoning.

The court below erroneously rationalized a denial of compensation upon the basis of the distinction be-

tween traditional zoning and the "acceptable" purpose of regulations to preserve historical landmarks. Indeed, it is this very distinction upon which compensation is constitutionally required.

While it is good for a community to preserve its historic heritage, the strong desirability of that goal is insufficient reason to shift the costs of implementation of such a governmental program to an individual property owner.

Professor Arvo Van Alstyne in an article, *Taking or Damaging by Police Power*, 44 So. Cal. L. Rev. 1 (1970), noted the distinction between the role of government acting in an arbitral capacity and that of an enterprise function when he stated that:

"When the government steps out of its role as a neutral arbiter engaged principally in 'defining standards to reconcile differences among private interests in the community,' and instead acts in an enterprise capacity seeking the 'enhancement of its resource position, 'the use of regulatory power is more readily seen by the judicial eye to constitute a compensable 'taking' than a non-compensable regulation.'"

(See also Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 63 (1964).)

It is a well established principle in both federal and state courts that the costs of a public good should be distributed to those who will benefit. *Armstrong v. United States*, *supra*; *Holtz v. Superior Court*, 3 Cal. 3d 296, 303 (1970).

In a landmark California inverse condemnation case, Justice Traynor in *House v. Los Angeles County*

*Flood Control Dist.*, 25 Cal. 2d 384 (1944), expressed the principle well when he stated at 396-97:

"The decisive consideration is the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner."

It is, therefore, submitted that appellees' desire to establish a public monument out of private property is a project that cannot be achieved without cost. The allocation of that cost should be distributed to those that will benefit from the project.

Justice Holmes' famous admonition is as relevant today as when he stated it in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416, that:

"In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. [Citations omitted.] We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Holmes' theory of the validity of police power exercise rests on strong considerations of the quantum of private economic damage and he has referred to its legitimate exercise as "the petty larceny of the police

power." 1 Holmes, *Laski Letters*, 457 Howe ed. (1953).

In the case of Grand Central Station, it is clear that the limits have been vastly exceeded.

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**CONCLUSION**

*Amicus* respectfully submits that the trial court properly found a taking of appellant's property as a result of an unreasonable interference with its use. As such that ruling should be upheld and the decision of the New York Court of Appeals reversed.

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January, 1978.

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*Appellees.*

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**MOTION OF THE REAL ESTATE BOARD OF NEW  
YORK, INC. FOR LEAVE TO FILE A BRIEF *AMICUS  
CURIAE* AND BRIEF *AMICUS CURIAE***

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MENDES HERSHMAN

MICHAEL H. SIEGLER

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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**MOTION OF THE REAL ESTATE BOARD OF  
NEW YORK, INC. FOR LEAVE TO FILE  
A BRIEF *AMICUS CURIAE***

---

The Real Estate Board of New York, Inc. (the "Board") hereby respectfully moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the Appellants in the above-captioned case.<sup>1</sup>

The Board is a New York City association of those involved in the real estate industry, property owners, de-

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<sup>1</sup> As provided for in Rule 42(2) of the Rules of this Court the Board attempted, but was unable to obtain, consents from all the parties to this case. Counsel for Appellees consented to the appearance of The Real Estate Board of New York, Inc., as *Amicus Curiae*, however counsel for appellants did not.

velopers, lenders, managers and brokers. Its current membership is 3,344. Most of its owner members own property in New York City and the surrounding area, but many have interests and holdings throughout the United States.

The Board has a philosophical commitment to the traditional respect our society affords private property and private property rights. It believes that any change in these constitutionally guaranteed areas must come, if at all, gradually so that the stability of property ownership and property values is not unduly impaired. On a more practical level the members of the Board are continuously concerned with the preservation and development of real property. The Board is profoundly concerned that the rules of law and governmental processes affecting the ownership and development of real property are reasonable, clear, of relatively easy application and capable of operating at high levels of predictability. Therefore, the Board has a great interest in decisions that will have a general impact on real property law, the regulation of land use and development and the valuation of real estate for sale, leasing, mortgage financing, review of real estate tax assessments and the exercise of eminent domain.

The decision now on appeal before this Court was decided by the Court of Appeals of New York. It will have immediate ramifications on the law of New York State in these areas and will therefore immediately affect the owner members of the Board and the real estate industry in general. Because that decision rested on the interpretation of rights embodied in the Federal Constitution, it will also potentially affect the law of other states as well.

The Court below held that the Fifth and Fourteenth Amendments are not violated where a municipality regu-

lates individual historic landmarks, without providing compensation, in a manner which prevents an owner of the landmark from realizing a reasonable return. It further held that in ascertaining the base upon which reasonable return is computed, a component which the Court variously refers to as "accumulated indirect social and direct governmental investment"; or the "contributing external factors derived from the social complex"; or "society's contribution";—must first be subtracted. A reasonable return, in its view, is only constitutionally required on the residue or base, which the Court variously refers to as the "privately created and privately managed ingredient"; or the "privately contributed ingredient" of the property's value. The Court below also held that in ascertaining reasonable return on this reduced base it is proper to impute to the landmark property income that an owner may derive from other properties it may happen to own in the vicinity of the landmark. These results were reached under an operative statute that defined reasonable return as an annual net return of 6% on the assessed valuation of the landmark, treated as a single property entity.

The Board respectfully submits that these conclusions of the Court below are in conflict with prior decisions of this Court dealing with the relationship of the police power to the Fifth and Fourteenth Amendments. Additionally, the Board submits that the holdings below on the issues of reduction of base and the imputation of income between separate properties of a single owner, constitute wholly unprecedented departures from traditional concepts of Anglo-American property law, and from the statutory guidelines established in the operative regulation, a landmarks preservation ordinance.

It is the opinion of the Board that if the legal analysis and conclusions of the Court below on these questions are

allowed to stand, traditionally accepted principles of private property will be seriously undermined. The Board also believes that the decision below introduces into questions of property valuation and assessment large areas of uncertainty and unpredictability. These unsettling effects of the decision of the Court below will be felt in condemnation, tax and real property assessment cases, and in all other related areas of the law where the valuation of real property is in issue.

Nor can it be clear from the decision below that the holding of the Court of Appeals was limited to designated landmarks belonging to railroads or public utilities, which have traditionally been assisted by the public through franchises, grants and other benefits. The Court below formulated the first of the two basic issues before it in general terms as the extent to which government must, "when regulating private property", allow a reasonable return on public contributions not created "by the efforts of the property owner." There is no inherent limitation on the application of the principle to such landmark property alone.

Furthermore, the reasoning of the Court below cannot logically be confined to such landmark property. It observed that "no property has economic value in the absence of the society around it. . . ."; and that reasonable return need not be guaranteed on "opportunities for the utilization or exploitation [of attributes derived from the 'social complex'] which an organized society offers to any private enterprise. . . ." In its recapitulation of its holding the Court of Appeals stated, in general language, that "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." Again, there is no qualification which would necessarily limit the import of this holding to only landmark property belonging to a railroad or to a public utility.

The Board contends that the implications of the decision below greatly transcend the interests of the parties litigant. It therefore seeks leave, from this Court, to file its *amicus* brief to demonstrate that these implications are inconsistent with constitutional principles, unsettling to our concepts of private property, destructive of property values and erroneous as a matter of law. Leave is therefore sought to address the following question and its three subdivisions:

Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):

(a) An owner is denied its right to a reasonable return on its property?

(b) The return on its regulated-business property is computed on a base from which social contributions are excluded, and to which income from other property it owns is imputed?

(c) Speculative air development rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts?

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
October Term, 1977

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**No. 77-444**

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PENN CENTRAL TRANSPORTATION COMPANY, THE NEW  
YORK AND HARLEM RAILROAD COMPANY, THE 51ST  
STREET REALTY CORPORATION, UGP PROPERTIES,  
INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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**BRIEF OF THE REAL ESTATE BOARD OF  
NEW YORK, INC. AS *AMICUS CURIAE***

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

---

**BRIEF OF THE REAL ESTATE BOARD OF  
NEW YORK, INC., AS *AMICUS CURIAE***

---

**Preliminary Statement**

The Real Estate Board of New York (the "Board") submits this brief as *amicus curiae*, addressed to certain issues specified below. The Board urges this Court to consider, in reviewing the order of the Court of Appeals of New York, the arguments raised *infra* as to the reasoning upon which the decision of the Court of Appeals is based. The order of the Court of Appeals, entered on June 23, 1977, unanimously affirmed an order of the New York Appellate Division for the First Judicial Department. The order of the Appellate Division, with two of the five justices dissenting, reversed an order of the Supreme Court of New York, New York County in favor of Appellants.

### Opinions Below

The opinion of the Court of Appeals of New York (the "Court of Appeals"), is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977). The majority opinion of the Appellate Division of the Supreme Court of the State of New York (the "Appellate Division") is reported at 50 App. Div.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975); and the minority opinion at 50 App. Div.2d at 275, 377 N.Y.S.2d at 30. The opinion of the Supreme Court of the State of New York, New York County, per Saypol, J., is unreported but is annexed to the Jurisdictional Statement as Appendix C.

### Questions Presented

The Board as *amicus curiae*, addresses this brief solely to the following questions:

1. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), an owner is denied its right to a reasonable return on its property?

2. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), the return on its regulated-business property is computed on a base from which social contributions are excluded and to which income from other property it owns is imputed?

3. Are a private property owner's rights under the Fifth and Fourteenth Amendments violated

where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance), speculative air development rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts?

The Board has not formulated and does not express a position with respect to any of the other issues presented by the Appellants.

### Interest of the Board as *Amicus Curiae*

The Board is a New York City association of those involved in the real estate industry, property owners, developers, lenders, managers and brokers. Its current membership is 3,344. Most of its owner members own property in New York City and the surrounding area but many have interests and holdings throughout the United States.

The Board has a philosophical commitment to the traditional respect our society affords to private property and private property rights. On a more practical level those Board members, who are concerned on a daily basis with questions involving the ownership and operation of real property in New York City, have a strong interest in seeing that the laws affecting real property and their administration are reasonable, clear, of relatively easy application and capable of operating at high levels of predictability. Therefore, the Board has a great interest in decisions that will have a general impact on real property law, the regulation of land use and development, the valuation of real estate for sale, leasing, mortgage financing, review of real estate tax assessments, the exercise of eminent domain, aesthetics and landmarks preservation.

It is the opinion of the Board that if the legal analyses and conclusions of the Court of Appeals of the State of New York are allowed to stand, it will subject real property to governmental action which may deprive property of its value without compensation and introduce thereby large areas of uncertainty and unpredictability into the ownership and operation of property. These unsettling effects of the decision of the Court below will be felt in landmarks preservation, condemnation, tax and real property assessment cases, and in all other related areas of the law where the valuation or control of the use of real property is in issue. The Board contends that the implications of the decision below greatly transcend the interests of the parties litigant.

### Statement

In 1967 Grand Central Terminal ("Grand Central" or the "Terminal"), a privately owned commercial railroad terminal located in Manhattan, New York, was designated a landmark and a landmark site. These designations were made under the Landmarks Preservation Ordinance (the "Ordinance"), Administrative Code of the City of New York, §§ 207-1.0 *et seq.* (the "Admin. Code"), by the Landmarks Preservation Commission of the City of New York (the "Commission" or the "City"). The Ordinance, adopted pursuant to State enabling legislation,<sup>1</sup> seeks to limit, through the exercise of the City's police power, the destruction or alteration of landmarks. The effect of these designations was to prevent any construction on the site or alteration of the exterior of the Terminal without the

<sup>1</sup> N.Y. General Municipal Law, § 96-a (McKinney).

prior consent of the Commission. Admin. Code, §§ 207-4.0-6.0.<sup>2</sup>

Between July, 1968 and January, 1969 Penn Central Transportation Company (together with its subsidiaries, the New York and Harlem Railroad Company and the 51st Street Realty Corporation) and UGP Properties, Inc., respectively the owner and the prospective developer, pursuant to contract, of air rights above Grand Central (hereinafter referred to collectively as "Penn Central") submitted to the Commission several applications for permission to construct an office building in the air space above the Terminal which was authorized under the existing zoning ordinance.

The first development plan submitted to the Commission became known as Breuer I, named for the renowned modern architect Marcel Breuer, whose firm prepared the design. Under Breuer I, a modern, high-rise office building was to be constructed over the Terminal in such a fashion that no alteration of protected exterior features of the Terminal, especially its south facade with its striking example of the French Beaux Arts architectural tradition, would occur. (214-17, 228-29, 23<sup>3</sup>) Only after the Commission rejected Breuer I did Penn Central submit an alternative plan, known as Breuer II Revised. The design envisioned by Breuer II Revised was substantially similar to

<sup>2</sup> The Ordinance defines "landmarks" as certain improvements, including buildings at least thirty years old which, in the opinion of the Commission, possess "a special character . . . historical or aesthetic interest or value. . . ." Admin. Code, § 207-1.0(n). A "landmark site" is defined as a unit of real property containing a landmark "and any abutting [real property] used as and constituting part of the premises on which the landmark is situated." Admin. Code, § 207-1.0(o).

<sup>3</sup> The numbers refer to pages in the Record on Appeal in the Court of Appeals.

Breuer I. Unlike Breuer I, however, Breuer II Revised required the demolition of the south facade and of a part of the Terminal itself which now consists of a waiting room and commercial space fronting on 42nd Street in Manhattan. Under both Breuer I or Breuer II Revised the Terminal's main concourse, a large, airy room 125 feet high at its apex and, according to the Commission, its most striking feature, was to be preserved. (50 App. Div.2d at 269; 377 N.Y.S.2d at 24; 2817).

In August, 1969, following a hearing, the Commission rejected both the resubmission of Breuer I and also the initial submission of Breuer II Revised. (2242-2255) In its written opinion rejecting the appropriateness of Breuer I, the Commission distinguished the effect on the Terminal of the Pan American Building, a high-rise office structure, that already exists on the designated site. It wrote that while the Pan American Building, which is located due north of the proposed new building "is about 375 feet back of the south face of the Terminal. . . . [t]he south face of Breuer I would be only 30 feet away." Therefore:

"[A]ll the softening effects of distance (atmospheric perspective) and all the present sense of separation would be lost. The full play of sunlight and shadow on the Breuer facade would be in direct competition with the richly modelled design of the Terminal below it and nearly in the same plane."

The Commission concluded that:

"[T]o balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the terminal by its sheer mass. The 'addi-

tion' would be four times as high as the existing structure and would reduce the landmark itself to the status of a curiosity." (2250-51)

The Commission also ruled, when it rejected the two Breuer plans, that it did not have jurisdiction to consider Penn Central's application for relief from the Ordinance on the ground of economic hardship. (2246-47) Although § 207-8.0 of the Ordinance generally allows the Commission to grant such relief where a designated commercial landmark is not realizing a reasonable return, commuter railroad real property receiving a tax exemption under state law does not come within the ameliorative intent of this provision. Admin. Code, § 207-8.0(a)(2).<sup>4</sup> The Ordinance defines "reasonable return" as a "net annual return of six per centum of the valuation of an improvement parcel", and further provides that, in general, "[s]uch valuation shall be the current assessed valuation established by the City. . . ." Admin. Code, § 207-1.0(v)(1) and (2).<sup>5</sup>

The effect of these rulings by the Commission was to deny Penn Central the right to construct an office building over the Terminal which, but for the designation of the Terminal as a landmark pursuant to § 207-2.0(a)(1), Admin. Code, would otherwise be permitted under local zoning regulations. (1178-1181) The assessed valuation of the Terminal

<sup>4</sup> The state tax exemption is provided by N.Y. Real Property Tax Law, § 489-ff (McKinney).

<sup>5</sup> Net annual return is defined, after allowing for certain exclusions and inclusions which are not presently applicable, as "the amount by which the earned income yielded by the improvement parcel during a [given] year exceeds the operative expenses of such parcel during such year. . . ." Admin. Code, § 207-1.0(v)(3)(a). An improvement parcel is defined as a "unit of real property which includes a physical betterment constituting an improvement and the land embracing the site thereof, and . . . is treated as a single entity for the purpose of levying real estate taxes. . . ." Admin. Code, § 207-1.0(j).

is approximately \$33 million so that under the standard set forth in the Ordinance, it does not yield a reasonable return unless its net annual return approximates 6% of \$33 million, or about \$2 million per year. (1964)<sup>6</sup>

In October, 1969, Penn Central filed an action for declaratory judgment in State Supreme Court challenging, on federal and state constitutional grounds, the impact of the Ordinance on the Terminal's ability to realize a reasonable return. Based upon evidence adduced before the trial court, the presiding State Supreme Court Justice found that the Terminal had an operating deficit in 1971 in excess of \$1.9 million. This was well below the 6% net annual return on assessed valuation which the standard established in the Ordinance defined as "reasonable." Evidence submitted by the City merely tended to reduce the annual deficit for 1971 from more than \$1.9 million to approximately \$1.1 million. 50 App.Div.2d at 278-79; 377 N.Y.S.2d at 34 (dissenting opinion). The trial court further found that Penn Central's right to transfer air development rights, pursuant to certain City zoning resolutions,<sup>7</sup> to alternative sites it owned adjacent to the Terminal, did not provide proper compensation. *Id.* 50 App.Div.2d at 283; 377 N.Y.S.2d at 37-38.

In June, 1970, prior to the trial court's decision,<sup>8</sup> Penn Central became insolvent, was declared bankrupt, and had its affairs pass to the control of trustees in bankruptcy. Between January, 1971 and June, 1972 the trustees, seeking to ensure the continued operation of two commuter rail-

<sup>6</sup> Because of the exemption provided for by § 489-ff, *supra*, p. 7, n. 4, the reasonable return standard of § 207-1.0(v) is not directly applicable here, yet it does provide an objective guideline against which reasonable return can be measured.

<sup>7</sup> Applicable provisions of these zoning resolutions are annexed to the Jurisdictional Statement as Appendix F.

<sup>8</sup> The decision of the trial court was rendered in January, 1975.

road networks, vital to the City's transportation scheme, entered into a series of contracts with the Metropolitan Transportation Authority of New York (the "MTA") and the Connecticut Transportation (the "CTA"). Under these contracts the MTA and the CTA assumed the ownership and operation of these commuter services and employed Penn Central to conduct them on their respective behalfs.<sup>9</sup>

In addition, the MTA entered into a sixty-year lease of Grand Central whereby it agreed to pay Penn Central a maximum annual rent of \$454,415 for the use of the Terminal. For its part Penn Central agreed to contribute a credit towards the MTA's expenses of operating the Terminal in the amount of at least \$2 million annually for sixty years. Under this lease the MTA became Penn Central's tenant and is alone entitled to the rents and other economic benefits of the Terminal. However, the air rights above the Terminal were specifically excluded from the coverage of this lease. The cumulative effect of these necessary legal agreements was to "leave Penn Central with no possible source of return from the Terminal save [air] development rights." 50 App.Div.2d at 278, 283; 377 N.Y.S.2d at 33, 37 (dissenting opinion).

The Appellate Division reversed the State Supreme Court decision on the ground that Penn Central failed to sustain its burden of proving that the effect of the Landmarks Preservation Ordinance, as it applied to the Termi-

<sup>9</sup> The assumption by public agencies of the commuter lines, when taken in conjunction with the assumption of long-distance passenger service by Amtrak (1971) (see 45 U.S.C. §§ 501 *et seq.*) and the pre-existing public ownership of the City's subway and bus routes, means that virtually the whole transportation network servicing the Terminal is either publicly or quasi-publicly owned.

nal, constituted a "compensable taking." 50 App.Div.2d at 272; 377 N.Y.S.2d at 27.<sup>10</sup>

The Court of Appeals, in the decision now appealed from, affirmed, but on grounds distinct from those relied upon by the lower courts. It acknowledged that the Due Process Clause prohibits regulations that deprive a property owner, without providing compensation, of a reasonable return on his property. However, it held on the central question of whether Penn Central was receiving a reasonable return on the assessed valuation of the Terminal (the base provided for in the Ordinance) that reasonable return was not to be computed as a function of that base. It held, instead, that in computing reasonable return:

"[T]here is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests. . . . It is enough for the limited purposes of a landmarking statute . . . that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to

<sup>10</sup> Penn Central's specific failures of proof, according to the Appellate Division's majority, included its failure to show that its deficit was attributable to its operation of the Terminal as distinct from its railroad operations, its failure to impute a rental value to the space it occupied in the Terminal which was devoted to its railroad business, its failure to sustain its burden of proving that it was unable to manage the Terminal more efficiently, its failure to establish that its air development rights could not be utilized over other properties it owns in the vicinity of the Terminal, and finally, its failure to prove that the MTA and CTA agreements were justification for invalidating the Terminal's landmark designation. See 50 App.Div.2d at 272-73; 377 N.Y.S.2d at 28-29.

be based. All else is society's contribution. . . ." 42 N.Y.2d at 328; 397 N.Y.S.2d at 916.<sup>11</sup>

Under the approach of the Court of Appeals this so-called "privately created and privately managed ingredient" somehow is to be segregated out and subtracted from the full value of the property and a reasonable return should be allowed only on this privately created component. The property owner, according to the Court of Appeals, is entitled to no return on that ingredient of property value created "by the accumulated indirect social and direct governmental investment in the physical property, its functions and surroundings." 42 N.Y.2d at 327; 377 N.Y.S.2d at 916.

The Court justified this innovative procedure by pointing out that much of the value of the Terminal was created by public effort. After noting that society granted the railroads of the nineteenth century, including the one which constructed the Terminal, various benefits, and further that the City, through its construction, maintenance and operation of municipal transportation routes, has also increased the value of Grand Central, the Court concluded that:

"Absent this heavy public governmental investment in the terminal, the railroads, and connecting transportation, it is indisputable that the terminal property would be worth but a fraction of its current economic value.

• • •

<sup>11</sup> This principle, according to the Court of Appeals, is not confined to designated landmark property alone, but apparently applies to all private enterprise. The Court wrote, in the same passage quoted above, that these "attributes . . . derived from the social complex" create ". . . opportunities for . . . utilization or exploitation which an organized society offers to *any private enterprise*, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which *the private enterprise* could neither exist nor prosper." *Id.* 42 N.Y.2d at 328; 397 N.Y.S.2d at 916 (emphasis supplied).

"To put the matter another way, the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint, and for most of its existence, made both the terminal and the railroads of which it was an integral part, a great financial success for generations of stockholders and bondholders. . . . A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad. The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely by the society in which it was permitted to evolve." 42 N.Y.2d at 331-33; 397 N.Y.S.2d at 919.

It is not significant that the Terminal currently operates at a loss, because, in the opinion of the Court of Appeals:

"[T]he [Terminal] may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that [Penn Central's] heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imputed to the terminal." 42 N.Y.2d at 333; 397 N.Y.S.2d at 920.

In addition to receiving a reasonable return based upon the imputation of income from other properties it owns in the vicinity of Grand Central Terminal, Penn Central was not denied its right, according to the Court, of exploiting certain air development rights. Under the Ordinance and municipal zoning regulations Penn Central's air rights above the Terminal may be transferred to other properties

it already owns. The Court admitted that there were many defects in the City's program for air rights transfers and many obstacles in the way of exploiting these rights. 42 N.Y.2d at 334-35; 397 N.Y.S.2d at 920-21. The Court was of the opinion, though, that "[t]hese substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the terminal itself." 42 N.Y.2d at 336; 397 N.Y.S.2d at 922. Nevertheless, although acknowledging that its analysis raised issues of "impene-trable densities" the Court ultimately concluded that "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." 42 N.Y.2d at 336-37; 397 N.Y.S.2d at 921. It ultimately held, therefore, that "the regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power." 42 N.Y.2d at 328; 397 N.Y.S.2d at 916.

### Summary of Argument

#### (a)

The present case requires this Court to apply the constitutional test which distinguishes between the non-compensable regulation of property pursuant to the police power, and the taking of property for public use, which, under the Fifth and Fourteenth Amendments, requires compensation. The decision of the Court below has obliterated this distinction. It has affirmed a result that allows the designation of private property under a landmarks preservation statute, a designation that may make it impossible for a property to yield a reasonable return, to be considered a non-compensable, police power regulation.

Such a conclusion is inconsistent with the established test of this Court which views the line separating valid

police regulations of property from compensable takings as one of degree. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). A variant of this test is applied where the constitutionality of zoning restrictions is in issue. These restrictions are analogized to the common law doctrine of nuisance and will generally be allowed where they seek to restrain acts that have a substantial relation to the community's health, safety, morals or general welfare. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). The core of the police power is the promotion of the safety of the community.

The scope of the police power is diminished where it seeks more affirmative goals, such as the beautification of the community. These are proper objectives of state interest but, in contrast to the nuisance analogy, generally they are attained through the exercise of eminent domain. The policy ground for this distinction is that it is considered unfair for the burdens of advancing the general welfare, through the coercing of affirmative acts, to fall disproportionately on a single citizen or property owner. This limitation of police power is appropriately applied to the landmark regulations before this Court. While the statute as written does balance public concern with individual rights, in this case the determination made deprives the property owner of the beneficial use of the property without compensation.

### (b)

The present landmarks statute attempts to provide that a property designated under its provisions is still assured of a reasonable return. The Court below has not adhered to that protective standard. On the contrary it has introduced unprecedented ideas into its analysis of the statute. Instead of gauging the reasonableness of return as a function of the assessed value of a property (the norm provided

in the law) the Court has bifurcated the concept of value. It has held that a property owner is only entitled to a reasonable return on the private components of the property's value; so-called "social" contributions to value are excluded from its base for the purpose of computing reasonable return.

The Court has not suggested any standards that would control this process of apportioning the value of property into private and public components. There is no precedent for this binary theory of property. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The implications of this theory are unsettling to the many areas of the law dealing with questions of property valuation.

The Court below also has held that a landmark property not realizing a reasonable return could have income imputed to it from other properties belonging to its owner. This conclusion, too, is inconsistent with standards established in the regulations in issue and without precedential support. The private property of railroads and public utilities is also entitled to constitutional protections, and cannot be taken by the public without the payment of just compensation.

### (c)

Speculative air development rights, which are contingent and uncertain, cannot be utilized without violating the constitutional standard of the Just Compensation Clause. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). General policy considerations and those specifically applicable to landmarks preservation laws justify continued adherence to the constitutional principles expressed in that Clause and the rejection of the present extreme extension of the police power over such private property.

## ARGUMENT

### POINT I(a)

**A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):**

- (a) **The owner's right to a reasonable return on its property is denied.**

The present case requires that this Court again apply the constitutional balancing test, rooted in the Fifth and Fourteenth Amendments to the Constitution of the United States, that distinguishes land use regulation, pursuant to the police power, from the compensable taking of private property for public use. The former is not deemed an appropriation of property subject to the attendant constitutional guarantee of just compensation, while the latter has traditionally been so regarded.

The Court of Appeals, in the decision now on appeal before this Court, has obliterated this established constitutional distinction. It has held that the designation of the Terminal as a landmark, a designation that greatly limits its economic potential, and indeed results in a massive operating loss, to be a valid exercise of the City's police power. In reaching its conclusion the Court of Appeals has given theoretical recognition to but failed to follow, the fundamental principle, well established in the prior decisions of this Court, "that government may not, by regulation, deprive a property owner of all reasonable return on his property." 42 N.Y.2d at 327; 397 N.Y.S.2d at 915.

This principle, derived originally from Blackstone (see 1 W. Blackstone, *Commentaries* at 138-9), has been applied in this Court at least since *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871); and *Mugler v.*

*Kansas*, 123 U.S. 623, 667-69 (1887). There is nothing in the prior cases of this Court that suggests that this principle is not as fully applicable to landmark property as it is to all other property. This principle was specifically adopted in the Ordinance, under which the Commission acted when it designated the Terminal as a landmark. The Ordinance, in fact, created an objective standard when it quantified reasonable return as a net return of 6% per year of current assessed valuation. (See pp. 7-8, *supra*). It should be emphasized here that *Amicus* is not challenging the basic constitutionality of the Ordinance, or the initial designation of the Terminal as a landmark. What is presently at issue is the interpretation given the Ordinance by the Court of Appeals and the effect of the application of the Ordinance, as so interpreted, on the ability of the Terminal to realize a reasonable return (as determined by the trial court and the dissenters in the Appellate Division).

Disregarding the statutory standard of 6%, the Court of Appeals held that in computing what the Ordinance mandates as a reasonable return, the base is not what the Ordinance says it is, namely assessed valuation. Instead, in the Court's view, the base is rather assessed valuation reduced by the "accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings." 42 N.Y.2d at 327; 397 N.Y.S.2d at 916.<sup>12</sup> The Court below gave no clue as to how this component of social and governmental investment might be computed.

The Court below also held that, in ascertaining reasonable return on this reduced base, it is proper to impute to the landmark property income that the owner may derive

<sup>12</sup> Other formulations of this concept of public contributions to base appear at 42 N.Y.2d at 328, 332-33; 397 N.Y.S.2d at 918-19 (see pp. 10-12, *supra*).

from other properties he may happen to own in the vicinity of the landmark. This result was reached despite the operative regulation defining reasonable return as an annual net return of 6% on the landmark treated as a single property entity with no reference to other properties of the same owner. (See p. 7 n. 5, *supra*). In addition, the Court treated speculative air rights, potentially transferable under the City's zoning regulations, as providing significant, "perhaps fair", compensation to the owner.

The Board respectfully submits that, collectively, these conclusions of the Court below are in conflict with prior decisions of this Court dealing with the relationship of the police power to the Fifth and Fourteenth Amendments. Additionally, the Board submits that the holdings below on the issues of reduction of base and the imputation of income between separate properties of a single owner constitute wholly unprecedented departures from traditional concepts of Anglo-American property law and from the statutory guidelines established in the Landmarks Preservation Ordinance.

It is the opinion of the Board that if the legal analysis and conclusions of the Court below on these questions are allowed to stand, traditional notions of private property will be seriously undermined. The Board also believes that the decision below will lead to the introduction into questions of property ownership and operation as well as valuation and assessment, large areas of uncertainty and unpredictability. These unsettling effects of the decision of the Court below will be felt in condemnation, tax and real property assessment cases, and in all other related areas of the law where the ownership, operation and valuation of real property is in issue.

Nor can it be clear from the decision below that the holding of the Court of Appeals was limited to designated

landmarks which belong to public utilities which have traditionally been assisted by the public through franchises, grants and other benefits. The Court below, in general terms, formulated the first of the two basic issues before it as: the extent to which government must, "when regulating private property", allow a reasonable return on public contributions not created "by the efforts of the property owner." Moreover, there is no inherent limitation on the application of the principle to landmark property alone. (See pp. 10-12, n.11, *supra*).

That the reasoning of the Court below cannot logically be confined to landmark property may be gleaned from the observation that "no property has economic value in the absence of the society around it . . ." and that reasonable return need not be guaranteed on "opportunities for the utilization or exploitation (of attributes derived from the 'social complex') which an organized society offers to any private enterprise. . . ." In its recapitulation of its holding the Court of Appeals stated, in general language, that, "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment." Again, there is no qualification which could necessarily limit the import of this holding to only landmark property. If the Court were to affirm this reasoning, the result would be the transformation of our traditional legal concepts regarding the nature of private property.

This Court has historically recognized that the distinction between a non-compensable regulation of property through the police power and a taking requiring just compensation is one of degree. As articulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In applying this balancing test this Court has expressed clear recognition of the confiscatory dangers inherent in too broad an application of the police power in the context of land use regulation and a consequent bias, in close situations, in favor of the constitutional protection of just compensation. As Justice Holmes noted, while at times the police power will be exercised in ways that diminish property values, when such exercise "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." If the test were not one of degree or magnitude, with clear outside limits placed upon the exercise of the police power, "the contract and due process clauses are gone." *Id.* 260 U.S. at 413.

A variant of the balancing principle of *Pennsylvania Coal* is applied to municipal zoning laws of general application. In the seminal case of *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926), this Court upheld, against a facial attack, the constitutionality of a comprehensive local zoning ordinance which restricted non-residential development, concluding that such regulations are analogous to the right to restrain public nuisances under common law.<sup>13</sup> Under the balancing test applied by the

<sup>13</sup> On this point the Court, per Justice Sutherland, wrote that:

"The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. . . . In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue]. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. . . . A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Id.* 272 U.S. at 387-88.

*Euclid* Court, it could not be concluded that the community acted unconstitutionally in restricting, out of considerations of public health, safety, morals or the general welfare, the industrial and commercial use of undeveloped property within its jurisdiction. *Id.* 272 U.S. at 390-92, 395-97.

Since *Euclid* this Court has followed this fundamental principle and has consistently held that the power of zoning is founded on the analogy to the restraint of nuisances. This type of analysis requires that the interests and public policy considerations of the community in support of its regulation, pursuant to its police power, be balanced against the harm done to the property owner subject to the regulation. Even where this analysis is applied in the context of a comprehensive zoning scheme, the regulation will not be upheld unless the community can show it is not arbitrary, and bears "a substantial relation to the public health, safety, morals or general welfare". *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), (regulation held not to satisfy this test).

This Court has considered relatively few cases since deciding *Nectow* which have required the application of the *Pennsylvania Coal* and *Euclid* tests. But what is apparent from the subsequent decisions of this Court is that the police power, in the context of land regulation, is at its most expansive and has the most substantial relation or nexus to the valid considerations underlying this power where the community's physical health or safety is truly at issue. So, for example, this Court has consistently sustained the reach of the police power against private property rights where the government acts under the exigencies of war (see *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944)) or riot (see *National Board of Young Men's Christian Association v. United States*, 395 U.S. 85,

92-93 (1969)), or out of consideration of the public's physical safety (see *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-97 (1962)) (restraining the maintenance of excavation site, deemed an attractive nuisance, in residential neighborhood)), or morality (see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)) (upholding restrictions preventing more than two, non-related persons from residing in one-family dwellings)).

These cases lend strong support to this Court's recent statement that, in general, the "promotion of safety of persons and property is unquestionably at the core of the State's police power. . . ." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Where these are the ends sought by the municipality its police powers are at their maximum reach.

The police power is at a greatly reduced level, however, where the community seeks not the restraint of nuisances but the creation or preservation of its aesthetic appearance or historic places. These are proper objectives of government and there is no longer any "basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public" *Roe v. Kansas*, 278 U.S. 191, 193 (1929); or its power to order, through the exercise of eminent domain, that beauty, as well as sanitary conditions, be created. See *Berman v. Parker*, 348 U.S. 26, 33 (1954); *United States v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896). But as these cases strongly intimate, where the government's goals are addressed merely to aesthetics or taste and it can be shown, as here, that a reasonable return is not available, then it must proceed under the eminent domain power with just compensation to the affected property owner.

In *Berman v. Parker*, *supra*, the property owner, although paid just compensation for his property, nevertheless objected to the condemnation of his economically viable

store which, although not a nuisance, did not harmonize with the vision of a new community being planned by an urban development agency. In upholding the municipality's approach this Court decided that if the legislative power determines that a community "should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* 348 U.S. at 33. But the *Berman* Court plainly indicated that where the community strives for more affirmative ends than the mere restraint of nuisances, it must either allow the owner a fair return on his property or resort to its condemnation authority, since "[t]he rights of the property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." 346 U.S. at 36. Significantly in *Berman*, the municipality never attempted to or maintained that it could proceed to its objective through the police power alone. See *United States v. Gettysburg Electric Ry.*, *supra* 160 U.S. at 680.

Clearly then, particularly in view of the absence, under the landmark designation, of a fair return on the property, the limited reach of the police power in an aesthetics case like the one at bar should require the payment of just compensation as in *Berman v. Parker*. The case now before this Court presents a far more compelling pattern than existed in *Berman* for the City to exercise, not its police power, but rather its powers of eminent domain.

In *Berman* the municipality was implementing a broad, neighborhood-wide slum clearance or nuisance-eradicating plan wherein only a small aspect, namely the condemnation of plaintiff's store, dealt with affirmative beautification schemes. In its effort to reach that result the municipality was also allowed to take, upon the providing of just compensation, an individual building that might not otherwise be subject to eminent domain.

In the present situation no hybrid of nuisance-ridding and affirmative goals is presented. Rather, in the instant case, the police power of the community is being utilized solely in an affirmative manner. It is being exercised through a landmark ordinance, to compel an individual property owner to maintain, at his expense and solely for the positive aesthetic benefit of the community, a celebrated but anachronistic structure on which it is impossible to realize a return which the governing law defines as "reasonable."<sup>14</sup> In assessing the validity of a landmark preservation regulation such as the one at bar, the constitutional calculus that finds expression through the balancing of the respective interests of the community and the property owner, therefore, weighs more heavily in the latter's favor.

This is so because there is a necessary corollary to the proposition discussed above concerning the relatively broad reach of the police power where it seeks the restraint of nuisance conditions, potentially harmful to the general community. The corollary is that the police power is relatively meager and the individual's property rights are correspondingly high where the municipality's goal is not the abatement of generally dangerous or harmful conditions but rather the preservation of a single, isolated parcel of privately owned property, which is of interest to the community, not because it retains a viable, economic function, but because it constitutes a splendid example of Beaux Art architecture in its pristine state. Where this is the community's sole end—and where it would otherwise require

<sup>14</sup> There has been no showing that the contracts into which Penn Central's trustees in bankruptcy were obligated to enter—in view of the company's precarious economic condition—with the MTA and CTA, were not arms-length transactions, made in good faith. See *Benenson v. United States*, 548 F.2d 939, 950-52 (Ct. Cl. 1977). As noted above, the effect of these transactions was to leave Penn Central in a continuous deficit situation regarding its ownership of the Terminal for a period at least as long as its sixty year lease with the MTA, (see p. 9, n. 9, *supra*).

depriving the owner of a fair return on his property—it can be achieved only by compensating the owner for placing these restrictions on his otherwise proper and legal utilization of his property.

The policy behind this requirement is clear. It is easier for a community to agree on what is harmful to its interests, than it is for it to decide on what is beneficial. The eradication or regulation of objectionable conditions, such as crime, filth, disease, or the inappropriate juxtaposition of function (a pig in the parlor, *supra* at p. 20, n. 13 or a charnel house in a one-family home district), are universal goals of organized communities. These are easily understood, uncontroversial goals which command widespread community support, and can be achieved by government restraining the doing of certain acts by individuals. For these reasons they are at the core of the traditional police power.

On the other hand matters of art and aesthetics involve considerations of subjective judgment and taste which can be influenced by changing and temporal styles, fashions and considerations. Government does not, necessarily, possess greater insight and sensitivity here into what is ultimately valuable and important. Where government acts to designate as a landmark a certain private work or structure that it deems worthy of preservation, it must do more than merely restrain their owner from destroying this work. It must also compel him to continue to affirmatively support and maintain it.<sup>15</sup> The compelling of costly and affirmative acts from an individual is not, generally, one of the ends of

<sup>15</sup> In fact the Ordinance specifically provides criminal sanctions against persons who violate its provisions. Admin. Code, § 207-16.0. Because of the unseemliness of sending a citizen to jail for his refusal or inability to underwrite the cost of preserving a community landmark, the Ordinance is supposed to operate in a manner which provides relief for property yielding an insufficient return, although, for reasons noted earlier, that provision of the Ordinance, § 207-8.0, is not directly applicable to the Terminal (see p. 8, n. 6, *supra*.)

the police power. See Dunham, "A Legal and Economic Basis for City Planning," 58 Column.L.Rev. 650, 651 (1958). Instead, in part to restrain government from acting irresponsibly in these areas, this Court has in the past required that society pay for its aesthetic and historic preservation judgments. See *Berman v. Parker*, *supra* 348 U.S. at 36; *United States v. Gettysburg Electric Ry.*, *supra* 160 U.S. at 680.

The present situation counsels strongly for the continued limitation of the police power in the area of aesthetic choices. It is evident here that there is nothing on the face of the designs for the proposed Beuer buildings that could be regarded as a community nuisance. There is certainly nothing inappropriate about the existence of a modern, high-rise office building in a section of the City which is zoned for, and indeed now contains a cluster of such buildings which may well be the most concentrated in the world. Reasonable minds in the community might easily differ on whether the preservation of the quality of sunlight and shadow (and what the Commission called "atmospheric perspective")—that now characterizes the south facade of the Terminal, and which might be affected by the proposed building (see p. 6, *supra*)—is not more than offset by considerations of how the new building may increase the City's tax revenues, or land values in the area. Nor can it be said that the architectural community is necessarily in agreement with the views expressed by the Commission in rejecting Breuer I.<sup>16</sup>

The community's purposes for regulating individual property in these cases is generally less compelling than in those where the police power is clearly properly utilized. Thus there is a particular inequity in landmark regulations which, unlike zoning or historic district regulations (see

<sup>16</sup> See R. Venturi, *Complexity and Contradiction in Architecture* 42 (1966).

*Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. den.* 426 U.S. 905 (1976); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557, 561-562 (1955); *Figarsky v. Historic District Commission*, 171 Conn. 198, 368 A.2d 163, 170 (1976)), does not have general, or even neighborhood-wide application. As noted by the Court of Appeals, in landmark regulation:

"the burden of limitation is borne by a single owner. He may or may not benefit from the limitation but his neighbors most likely will. In contrast both an owner and his neighbors benefit to some degree and in some manner from zoning and historic districting." 42 N.Y.2d at 330; 397 N.Y.S.2d at 917-18.

The use of public power to preserve specific structures too as in the landmark law here under consideration can be upheld when its general application will result only in a reasonable regulation of use. But when the restrictions on use deprive the owners of a reasonable return on the property, this amounts to a taking, which must be compensated. *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974).

Apart from forcing Penn Central, "a once great railroad," to maintain a deteriorating but ornate Terminal as a monument to the "glorious past" of railroading, 42 N.Y.2d at 333, 337, 397 N.Y.S.2d at 919, 922, it is hard to discern the social benefits that flow from this hermetic and economically-unwise arrangement. It is also unfair, in view of these circumstances and in view of the absence of a reasonable return on the property, to require that the burden of maintaining the property as a landmark fall solely upon the landowner.

### POINT I(b)

**A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance) :**

- (b) **The return on its regulated-business property is computed on a base from which social contributions are excluded and to which income from other property owned by the owner is imputed.**

The draftsmen of the Ordinance seemed aware of the limits this Court has placed on the extreme regulation of private property. The Ordinance reflects a belief on the part of the enacting legislative body that a landmark regulation that reduces net annual return on assessed value beneath 6% will, almost certainly, be deemed a confiscatory taking, requiring the payment of just compensation. (See pp. 7-8 *supra*).

But the Court of Appeals, in apparent solicitude towards the state of the City's finances, see 42 N.Y.2d at 337, 397 N.Y.S.2d at 922, has not adhered stringently to these protective guidelines of the Ordinance. Instead, the Court has transformed the stated standards of the Ordinance. In so doing it has reached a result that is illogical, unworkable and confiscatory, which undermines the concept of property embodied in the Fourteenth Amendment, and is inconsistent with its earlier decisions in this area. See *Fred F. French Investing Company, Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *In the Matter of Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185 (1966).

The most unprecedented aspect of the decision of the Court of Appeals is its disregard of the clearly expressed

legislative view that reasonable return on property is to be computed as 6% of its assessed valuation. Instead the Court has adopted the theory that the value of private property is composed of two distinct parts—one representing the private contribution and one the collective social input—which in their totality comprise the property's true worth. Private property subject to regulation of the state's police power is entitled, according to the Court of Appeals, to a reasonable return only on the private components of the property's value.

This notion constitutes a striking departure from ancient principles of Anglo-American property law and from accepted definitions of property. See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). It is axiomatic that property values assume certain social attributes. Property values, for example, may increase in times of peace and social tranquility and decrease during periods of war or civil strife. Similarly property values of a community may reflect the ability of that community to supply essential public services such as fire and police protection, sanitation and sewer facilities and the like. The inability of the community to supply these services will almost assuredly have an adverse impact on property values. By logical extension, the property values of a community are also a function of the ability of the larger polity, of which the individual municipality is but a small part, to maintain a broadly accepted currency, a functioning communications network, even, a common, widely understood language. Indeed the very concept of ownership is a "social attribute" of property, as is the legal tender by which an owner receives a return upon his property.

The theory adopted in this case by the Court of Appeals may have its supporters among certain commentators.<sup>17</sup> However, no other court, heretofore, to our knowledge, has adopted these unsettling views that displace long-established, traditional concepts of private property. Nor has any other court, to our knowledge, ever suggested that in ascertaining the true value of property the myriad social factors contributing to its value are to be winnowed out, leaving "real" value to be reflected merely by the privately contributed residue.

Even if we are to assume, *arguendo*, that what the Court of Appeals calls the "privately created and privately managed ingredient" of property could be somehow isolated from social inputs to value, the general employment of this concept would cause upheaval in many areas of property law. If this measure of value can be employed by the Landmarks Commission in this case to reduce the base on which a reasonable return is to be computed, there is nothing that would logically prevent the State from condemning private property on the value of the "private contribution" alone—substantial properties could be con-

<sup>17</sup> Some support for the result reached on this question by the Court of Appeals can be found in J. Costonis' *Space Adrift* (1974). Costonis has helped develop many of the arguments now before this Court. See Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv.L.Rev. 574 (1972); Costonis, "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 Colum.L.Rev. 1021 (1975). But see Berger, "The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis," 76 Colum.L.Rev. 799 (1976); Note, "The Police Power, Eminent Domain, and the Preservation of Historic Property," 63 Colum.L.Rev. 708 (1963). Costonis has written that "urban space should no longer be regarded simply as private property. . . . Rather, it has become in part a public asset which cities may allocate through incentive zoning to achieve community goals. . . ." *Space Adrift* at 35. Costonis does, at least, acknowledge that heretofore this approach has ". . . consistently been frustrated [by the courts] under outdated but deeply ingrained property and land use concepts." *Id.* at 35.

demned for fractions of their true value. The result would be that the state could—as it has in this case—confiscate property whenever it sees fit without having to compensate the owner for its value (as we have always understood that term). Even in the case of a tax assessment proceeding the owner might, on the authority of the doctrine enunciated by the Court of Appeals in this case, seek to reduce the value of this property by subtracting from it elements added through the public section (such as the value of roads, sewers, fire and police protection, transportation systems etc.) and have taxes assessed only against the remaining private component. Nor does the Court of Appeals, in upsetting the traditional, unitary concept of assessed valuation, adopted in the Ordinance, provide any guidelines or standards as to how its new, binary system is to be operated by the Commission. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962); *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 321-22 (1933).

Under our economic and social system property value often reflects the interaction of private initiative and capital with public policy and goals. But where the underlying investment is private and where the property is held in private hands, it has not been the policy of our law to factor out the public's contribution before ascertaining the value of the property. See *United States v. General Motors Corp.*, *supra*, 323 U.S. at 379; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). The adoption of such a theory would require the making of an incalculable number of assumptions about the public's often unintended and fortuitous acts, as when government, in laying out streets, creates unusual plots (i.e. Times Square, the Flatiron Building and the streets abutting Central Park) which add value over the years to the properties located there. Under our economic theory these attributes of value are

subsumed into the property as part of the total bundle of rights which constitute its value. The attempt to remove them, as the Court has done at bar in the case of Grand Central Terminal, is arbitrary and without rational foundation. It is inconsistent with our society's notions of private property, would create chaos if widely adopted, and should not therefore be countenanced.

The Court of Appeals in reaching its decision relied on yet another unusual proposition. It stated that, even if the Terminal is not receiving a reasonable return, part of the income from other profitable properties owned by Penn Central in the vicinity of the Grand Central should be imputed to the Terminal. The ground for this imputation was the Court's observation that "it should be evident that [Penn Central's] heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income were the terminal not in operation." 42 N.Y.2d at 333; 397 N.Y.S.2d at 920.

This proposition, aside from being intrinsically unsound, goes off on a tangent. The issue is not whether or not the Terminal continues in operation; all parties have always agreed that it should continue to operate as a terminal and the plans for the employment of the air rights by the construction of an office building above it contemplate the continuance of the Terminal even to the extent of preserving its present architectural facade. Consequently there can be no issue of depriving plaintiffs of income from their other properties in the area.

More importantly, however, it is totally immaterial to the constitutional issues raised in this action that some of the plaintiffs might fortuitously happen to own other properties in the area which might be affected one way or the other by the creation of a bar to the owner's right to use the air rights which are otherwise available to it.

In any event this conclusion is inconsistent with the standards set forth in the Ordinance. As noted at p. 7, n. 5, *supra*, reasonable return for purposes of a commercial landmark is defined as a "net annual return of six per centum of the [assessed] valuation of *an improvement parcel*." Admin. Code, § 207-1.0(v)(1) and (2) (emphasis supplied). An improvement parcel is defined, in material part, as a unit of real property which is "treated as a single entity for the purpose of levying real estate taxes." Admin. Code, § 207-1.0(j). Net return for the purposes of § 207-1.0(v) is defined in the Ordinance as "the amount by which the earned income yielded by the improvement parcel during a [given] year exceeds the operating expenses of such parcel during such year. . . .", after allowing for certain exclusions and inclusions which are not presently applicable. See Admin. Code, § 207-1.0(v)(3).

None of these legislative definitions make any provision for the imputation of income from one property of the regulated landowner to any other property he may happen to own. The Ordinance itself reflects traditional property law. There is no provable, non-speculative basis, or any foundation in real estate law, for imputing to the Terminal, income and value it theoretically adds to Penn Central's other properties in the vicinity. The standard in the Ordinance looks to whether the landmark is viable, in terms of annual net return, when considered alone. Nor is there any rational, non-arbitrary basis for distinguishing between the affect the Terminal has on other Penn Central properties in its vicinity from the affect it has, because it is a terminal and provisions transportation access, upon all property, regardless of ownership, located in this area of

the City.<sup>18</sup> Moreover, there is no proof from which to ascertain whether any incremental value to plaintiffs other properties exists at all. The Court of Appeals merely speculates that there is—scarcely a basis for depriving plaintiffs of constitutional rights.

In an apparent attempt to limit the potentially shattering implications of its decision, the Court of Appeals has attempted to demonstrate that the Terminal represents a special situation. It is not, in that Court's view, an "ordinary" landmark because so much of its value was created by "society as an organized entity, especially through its government. . . ." 42 N.Y.2d at 332; 397 N.Y.S.2d at 918. The Court of Appeals specified some of these social contributions as consisting of grants, franchises and other benefits to railroads, and the operation of municipal transportation routes in and around the Terminal without which there would be no need of railroad terminals such as Grand Central. *Id.* 42 N.Y.2d at 332; 397 N.Y.S.2d at 919. The implication the Court of Appeals draws from these statements is that the Terminal therefore possesses fewer rights with which to resist the City's police power restrictions and lesser claims to demand full compensation for the taking of its assets. While it is certainly true that railroads were favored by government policies in the mid-nineteenth century, it is illogical to leap from this premise to the conclu-

<sup>18</sup> The Court of Appeals appears to proceed, in making this argument, on an illogical assumption. It assumes that Penn Central has selfish motives in operating an economically non-viable terminal, namely, to benefit other property it owns in the area around Grand Central. To the contrary, Penn Central is seeking permission to develop the air rights above the Terminal precisely because Grand Central is not economically sustainable. The true beneficiaries of the present situation are the members of the general public who are having a necessary public facility (a commuter train terminal which is serviced by publicly owned transportation lines) subsidized and maintained in its original, anachronistic configuration by a recently bankrupt, private corporation.

sion, as the Court of Appeals appears to have done, that therefore they are entitled to fewer constitutional protections today. Such a conclusion is wrong as a matter of law. Neither that Court nor this Court has ever so held. In fact this position, to our knowledge, has never even been advanced where railroads and other publicly regulated industries have themselves been subjected to condemnation. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974); *United States v. Peewee Coal Co.*, 341 U.S. 114, 117-18 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12-13 (1949); *Roberts v. New York City*, 295 U.S. 264, 278-81 (1935); *In re City of New York*, 21 N.Y.2d 293, 287 N.Y.S.2d 403 (1967); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 285 N.Y.S.2d 24 (1967), *cert. den. sub nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968); *In re City of New York*, 18 N.Y.2d 212, 273 N.Y.S.2d 52 (1966), *appeal dismissed sub nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1967).

*In re Port-Authority*, *supra*, for example, presented a situation where a railroad, found to be "an essential public facility," 20 N.Y.2d at 465, was in a failing, economic condition. However, despite "the essentiality of [that] facility," *id.* at 465, there was no attempt to seize property of the railroad through the police power. As in all of the cases cited above, the only constitutional question presented was what constituted the proper measure of compensation for the taking, by condemnation, of private property. See *New Haven Inclusion Cases*, 399 U.S. 392, 482-83 n. 80 (1970); also see *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973); *United States v. Fuller*, 409 U.S. 488 (1973).

The Court of Appeals comes close to suggesting that because a privately owned business is a railroad or a regu-

lated utility, or because it maintains facilities widely used by the general public, its property is not within the full protection of the Fifth and Fourteenth Amendments. This Court has consistently rejected such contentions. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569-70 (1972); *Smyth v. Ames*, 169 U.S. 466, 522-24 (1898); *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226, 235-41 (1897); *Missouri Pac. Ry. Co. v. Kansas*, 216 U.S. 262, 274-78 (1910); *West v. Chesapeake & Pot. Tel. Co.*, 295 U.S. 662, 671 n.6 (1935).<sup>19</sup>

### POINT I(c)

**A private property owner's rights under the Fifth and Fourteenth Amendments are violated where, in disregard of standards established in the operative regulation (a landmarks preservation ordinance):**

- (c) **Speculative air development rights are deemed to constitute significant and perhaps fair compensation for definite legal rights it possesses under valid contracts.**

The Court of Appeals also held that no taking of private property is presently involved, because:

"[P]laintiffs have not been wholly deprived of the development rights above the terminal. Those rights have been made transferable to other parcels of land in the vicinity, at least eight of them owned by Penn Central. . . ." 42 N.Y.2d at 334; 397 N.Y.S.2d at 920.

<sup>19</sup> The position of the Court of Appeals on this question, although incorrect, lends support to Appellants' claim. Since the Terminal is such an important facility to the City, and since it is now primarily serviced by publicly-owned transportation networks, the City would not create a fiscally unwise precedent by its condemnation. While the City, perhaps, cannot afford to acquire through eminent domain all of the landmarks it may wish to preserve, the nature and function of the Terminal make it a sensible choice for a constitutionally valid public appropriation.

This conclusion does not withstand analysis.

The Court of Appeals attempts to distinguish the present fact pattern from its earlier, seemingly controlling decision in *French v. City of New York*, *supra*, 39 N.Y.2d 587, on the ground that here Penn Central owns the parcels to which the air rights are to be transferred. But the "legal limbo" to which the air rights involved in *French* were consigned, see 42 N.Y.2d at 336; 397 N.Y.S.2d at 921, also exists in the instant case. As the Court of Appeals itself concedes, there are "many defects in New York City's program for development rights transfers. . . ." 42 N.Y.2d at 334; 397 N.Y.S.2d at 920.<sup>20</sup> The Court of Appeals, for example, noted that:

"The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison. But the possibility that a better program could have been devised does not preclude analysis and justification of the existing one in this particular application." 42 N.Y.2d at 334-35; 397 N.Y.S.2d at 920.

In addition, the alternative sites to which the Landmarks Commission would prefer to see Penn Central's rights transferred, are encumbered by pre-existing leaseholds or estates, have been rejected on management grounds, or are otherwise not as desirable in the opinion of Penn Central.

<sup>20</sup> See Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," *supra* 85 Harv.L.Rev. at 585-589; Note, "The Unconstitutionality of Transferable Development Rights," 84 Yale L.J. 1101, 1110-11 (1975); Costonis, "The Disparity Issue: A Context for the Grand Central Terminal Decision," 91 Harv.L.Rev. 402, 419 (1977).

These are decisions which an owner should still be allowed to make, despite the deep intrusion upon such rights the Court of Appeals has deemed appropriate here.

Of even greater significance is the fact that the Landmarks Commission lacks the power to compel the transfer of these air rights to alternate sites. See *Costonis, supra* 85 Harv.L.Rev. at 585-86.

Penn Central's so-called rights are, therefore, speculative and contingent: first because of questions of economic feasibility and the desire of the owner to transfer them and second because any such transfer is subject to the vicissitudes of the political process and attacks through litigation and otherwise by the citizenry. See, 50 App. Div. 2d at 283; 377 N.Y.S.2d at 37 (dissenting opinion). To resolve constitutional rights on so tenuous a basis is inconsistent with the holding of *Seattle Trust Co. v. Roberg*, 278 U.S. 116, 121-22 (1928); compare *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 658 (1976).

Despite these myriad obstacles, the Court of Appeals concluded that these air development rights are a substitute for the property rights Penn Central would otherwise be allowed, but for the designation of the Terminal under the Ordinance. The Court stated that these "substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the terminal itself." 42 N.Y.2d at 336; 397 N.Y.S.2d at 922.

The Court of Appeals therefore, has obviously applied the wrong standard in this case. Prior decisions of this Court under the Just Compensation Clause require, not "perhaps fair" compensation but, rather, "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States, supra*, 148 U.S. at 326. This standard requires that the property owner be put "in

as good [a] position pecuniarily as if [its] property had not been taken." *United States v. General Motors Corp., supra*, 323 U.S. at 379. Prior to taking by the Commission of Penn Central's rights to the air space above the Terminal, Penn Central had clearly fixed legal rights under the contract it had entered with its air rights lessee. See p. 7, *supra*).

It cannot be reasonably concluded that these fixed legal rights are fully equivalent to a mere potential to exploit speculative and contingent air development rights. The decision of the Court of Appeals on this issue is, therefore, inconsistent with the prior holdings of this Court defining the meaning of just compensation.

The City, its Commission and the Court of Appeals have rejected a reasonable attempt by Penn Central to balance its economic interests with the aesthetic and cultural interests of society. In place of Penn Central's reasonable compromise proposal, the result below, as represented in the decision now on appeal before this Court, is extreme. It allows the City to mandate, through its police power, that Penn Central continue to operate the Terminal, at an annual financial loss of between \$1 and \$2 million, for the benefit of the people of the City. Furthermore, no compensation is provided for the denial by the City of Penn Central's application to permit alteration of the design of the Terminal, which alteration would enable it to operate at a profit. *Amicus* respectfully submits that in reaching this result the Court of Appeals has stretched the police power far beyond limits previously authorized by this Court and has done so in a manner which is inconsistent with, and seriously undermines, the Just Compensation and Due Process guarantees of the Constitution.

If the City insists on a result that takes rights away from Penn Central, and consigns the Terminal to perpetual economic non-viability, it must proceed according to the

Just Compensation Clause. This Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *National Board of Young Men's Christian Association v. United States*, *supra*, 395 U.S. at 89; *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 326. Penn Central is under no pre-existing public duty that would put it beyond the reach of this basic and equitable principle. See *Hurtado v. United States*, 410 U.S. 578, 588 (1973). While "[i]t is laudable to attempt to preserve a landmark . . . it becomes unconscionable when an unwilling private party is required to bear the expense." *People v. Ramsey*, 28 Ill. App.2d 252, 171 N.E.2d 246, 247 (1960).

Even in the absence of these constitutional considerations, this Court should not, for other policy reasons, sustain the result below. No greater damage to good architecture and the future of its preservation by landmark designation can be imagined than an affirmance of the rationale of the Court of Appeals in this case. No future developer of real estate could possibly afford to build a structure which by reason of its aesthetic quality might one day be designated a landmark.

To begin with, the value added by good architecture to property adds to the assessed value of that property and thereby markedly increases the owner's real estate taxes. See *Seagram & Sons, Inc. v. Tax Commission*, 14 N.Y.2d 314, 251 N.Y.S.2d 460 (1964). Then, should the landmark designation be affixed, must the owner continue to pay real estate taxes on the value enhanced by its architectural distinction? The value on which the tax would be computed to determine the limits of regulation, under the interpretation of the Ordinance by the Court below,

would be drastically reduced by whatever a court might find as society's contribution to the value of the property. Furthermore, if the rationale of the Court of Appeals were sustained it could be logically concluded that even if the property is taken by eminent domain or by regulation amounting to a taking, the only amount the government must pay for this taking would be the value of the real estate as reduced by the value of society's contribution to the property. For this Court to sustain such a result would only be "self-defeating" to valid considerations that underlie the landmarks preservation statutes.<sup>21</sup>

Given the nature of the "financial distress" that may now be afflicting the City, 42 N.Y.2d at 337; 397 N.Y.S.2d at 922, there is, perhaps, a certain consistency in the result reached below. It condemns Penn Central, a financially troubled company, to underwrite a financially draining Terminal, supposedly for the benefit of a financially distressed City. However, "from such false consistency real cities will never grow. Cities, like architecture, are complex and contradictory." Venturi, "Complexity and Contradiction in Architecture," *supra* at 54.

It is clear that if the end the City desires to achieve is the present, economically unwise one, it has sufficient power at its disposal to attain that end. But it is also clear that its powers of eminent domain, and not its police power is the allowable means to this end. Where the police power is used as it has been in this case, in a coercive way to appropriate

<sup>21</sup> "Self-defeating not only because it calls into question the propriety of such law, but also because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as landmarks in the years to come?" 50 App.Div.2d at 288; 377 N.Y.S.2d at 41 (dissenting opinion).

private property for the "public good", a violation of the Due Process Clause results. As Justice Holmes observed in *Pennsylvania Coal*, when the seemingly absolute guaranties of the Fifth and Fourteenth Amendments:

"are qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*" 260 U.S. at 415. (emphasis supplied)

The fact that government may accomplish its goals at a reduced public cost by confiscating private property or by ignoring other constitutional guaranties does nothing to justify such acts or to make them any less unconstitutional. See *Stanley v. Illinois*, 405 U.S. 645, 650 (1972); *United States v. Cors*, 337 U.S. 325, 332 (1949).

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**Certificate of Service**

The undersigned affirms that on the 19th day of January, 1978, a copy of the foregoing Motion of the Real Estate Board of New York, Inc. for Leave to File a Brief *Amicus Curiae* and Brief *Amicus Curiae* was served on each of the attorneys for Appellants and Appellees at the addresses listed below by depositing in the United States mail the same enclosed in an envelope with adequate postage thereon.

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FOR ARGUMENT

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In the Supreme Court of the  
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PENN CENTRAL TRANSPORTATION COMPANY, THE  
NEW YORK and HARLEM RAILROAD COMPANY,  
THE 51ST STREET REALTY CORPORATION, UGP  
PROPERTIES, INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

On Appeal from the Court of Appeals  
of the State of New York

Brief of Amicus Curiae State of California

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-444**

PENN CENTRAL TRANSPORTATION COMPANY, THE  
NEW YORK and HARLEM RAILROAD COMPANY,  
THE 51ST STREET REALTY CORPORATION, UGP  
PROPERTIES, INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

On Appeal from the Court of Appeals  
of the State of New York

## Brief of Amicus Curiae State of California

### JURISDICTIONAL STATEMENT

This Court noted probable jurisdiction on December 5, 1977. 28 U.S.C. section 1257(2). This amicus curiae brief is respectfully submitted by the State of California (pursuant to Rule 42(4) of this Court) acting by and through the Attorney General of the State of California on behalf of the California Coastal Commission and the San Francisco Bay Conservation & Development Commission.<sup>1</sup>

1. The California Coastal Commission is an agency of the State of California, charged with the duty of developing and enforcing plans for the permanent protection and restoration of the California coastline. Calif. Public Resources Code section 30000 et seq. The Commission and its functions are the outgrowth of an extensive planning and regulatory process mandated by the People of California in an initiative adopted in 1972. The constitutionality of that planning and regulatory process has been upheld against constitutional attack. *CEED v. California Coastal Zone Conservation*

## INTEREST OF THE STATE OF CALIFORNIA

The California Coastal Commission and the San Francisco Bay Conservation & Development Commission, the two agencies of the State of California at whose request this brief has been filed, have extensive regulatory authority over the proposed use and development of land and water areas within their respective jurisdictions. Protection of the natural resources and environment of the California coastline and of San Francisco Bay is a paramount objective for these agencies. See for example *CEED v. California Coastal Zone Conservation Commission*, *supra*, 43 Cal.App.3d 306; *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533. Actions taken by these agencies to promote the objective of protection of coastal natural resources has resulted in litigation where landowners have charged that the effect is to have inversely condemned their properties. See for example *State of California v. Superior Court* (1974) 12 Cal.3d 237; *Candlestick Properties, Inc.*, *supra*, and *Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1. It has been the consistent position of these agencies that their regulatory actions, taken pursuant to their respective enabling laws, constitute exercises of the police power and not exercises of the power of eminent domain.<sup>2</sup>

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*Commission* (1974) 43 Cal.App.3d 306. The San Francisco Bay Conservation & Development Commission is also a public agency of the State of California. Calif. Government Code section 66600 et seq. One of the Commission's main purposes is to provide permanent protection for the San Francisco Bay and its shoreline. The Commission's enabling legislation has likewise been upheld against constitutional attack. *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557.

2. The agencies, in addition, exercise trustees' powers over areas subject to the public trust for commerce, navigation and fisheries. *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 549; *Marks v. Whitney* (1971) 6 Cal.3d 251; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387.

While the instant case concerns the principles of law to be applied in landmark preservation efforts by public agencies, some of the principles involved are the same as those which govern the environmental protection efforts of these agencies. Therefore, the State of California respectfully requests that its contentions be considered in the instant matter.

## SUMMARY OF ARGUMENT

It is the position of amicus curiae that the actions of New York City in prohibiting construction of a multi-story office tower above Grand Central Terminal constituted exercises of regulatory authority pursuant to the police power. There was no attempt by New York City to acquire the property and no inequitable pre-condemnation activity by the City. Therefore, as a matter of law, no taking occurred and Penn Central is not entitled to just compensation.

Exercises of the police power are valid without any requirement of compensation if they do not violate constitutional requirements. If regulatory actions would violate constitutional standards by constituting a taking, they are invalid and not enforceable. Even in this event, no compensation is required to be paid to affected landowners. *Fred F. French Investing Co., Inc. v. City of New York* (1976) 385 N.Y.S.2d 5, 8, appeal dismissed, 429 U.S. 990. In this regard, *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 did not hold that a taking had occurred requiring payment of just compensation.

Finally, amicus curiae suggests that the residual economic benefit left to the landowner following regulation, one of the criteria usually considered in determining the validity of police power exercises, is best determined by comparing

before and after market values. This familiar and objective test is shown to be superior to tests requiring determinations that a reasonable rate of return is possible or that a reasonably beneficial use exists.

# I

**PENN CENTRAL HAS ASSUMED THAT A "TAKING" OCCURRED BY VIRTUE OF NEW YORK CITY'S ACTIONS; THIS ASSUMPTION IS ERRONEOUS AND SERVES TO OBSCURE THE REAL ISSUE, WHICH IS WHETHER THE CITY'S ACTIONS CONSTITUTED A VALID EXERCISE OF THE POLICE POWER.**

## A. Penn Central's Formulation of the Issues.

In the first paragraph of its jurisdictional statement, Penn Central indicates that its appeal is from a lower court decision "which holds that Penn Central is not entitled to just compensation for the development rights to the Grand Central Terminal that have been taken from it by operation of the New York City Landmarks Preservation Law." Jurisdictional statement at p. 1. Under "Questions Presented" Penn Central has formulated two of the four issues in terms of whether it is entitled to just compensation for "private property taken for public use". Jurisdictional statement at p. 3. Thus, Penn Central's legal analysis flows from the premise that the actions of New York City in regard to the Grand Central Terminal constituted a taking of private property for public use. We shall demonstrate that this is an incorrect premise. Once the faulty nature of that premise is recognized, the irrelevance of much of Penn Central's argument becomes apparent.

## B. The New York City Actions Pertaining to Grand Central Terminal Were Regulatory in Nature and Are Properly Judged by Whether They Constituted Valid Exercises of the Police Power.

This case arose as a result of decisions of an administrative body of New York City denying permission to Penn Central to build a multi-story office tower above Grand Central Terminal. The actions were taken pursuant to the express provisions of City legislative enactments authorizing the designation of landmarks and imposing a permit requirement for proposed alterations to landmarks. See generally, city's motion to dismiss at pp. 2-5. This legislation, with the implementing administrative mechanism, operates to control the conditions and circumstances under which use may be made of certain property. It is thus a classic example of a land use regulatory measure. See for example the zoning ordinance and implementing administrative mechanism sustained in *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365.

This does not ipso facto absolve them from any judicial review; as exercises of the police power they must be judged for their validity. However, absent any indication that the actions operated to create an actual public use or to unfairly utilize the power of government prior to acquisition, principles of eminent domain and just compensation are not applicable. *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, cert. den. 425 U.S. 904.

The first issue which generally presents itself in dealing with a police power measure is whether it is valid on its face. In this regard the elastic nature of the police power has been recognized by this court. *Euclid v. Ambler Realty Co.*, *supra*, at p. 387; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 5-6. The presence of a reasonable basis and the legitimacy of the objective of preserving historic landmarks

would seem to be beyond doubt (*Maier v. City of New Orleans* (5th Cir. 1975) 516 F.2d 1051 (including the cases cited at pp. 1059-60, fn. 44), cert. den. 426 U.S. 905; *Bohannon v. City of San Diego* (1973) 30 Cal.App.3d 416), and is not challenged by Penn Central. Brief for appellants at p. 12. The reasonable basis need only be "fairly debatable". *Maier v. City of New Orleans*, *supra*, at p. 1061. Judged by that standard, New York City's landmark law is valid as enacted. Therefore, the New York landmark legislation and administrative decisions made pursuant thereto constituted exercises of the police power.

The second issue, perhaps one of the most important in this case, is whether the City's administrative decisions denying the office tower somehow constituted acts of eminent domain resulting in a taking of Penn Central's property, or whether they merely constituted regulatory determinations taken pursuant to the enabling legislation. This question must be determined by the form and substance of these decisions. In this regard, the similarity between the circumstances of the case at bar and those involved in *Maier v. City of New Orleans*, *supra*, bear close analysis. Here, as in *Maier*, permission was required from an administrative body prior to construction which would alter or destroy historically valuable buildings. The standards governing the decision in New Orleans or in New York involve assurance that such new construction operates to preserve the historical and cultural values present. In the case at bar the decision to deny the office tower was based on the prior designation of Grand Central Terminal as a landmark. In *Maier* the enactment authorized:

"preservation of such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, . . ." *Id.* pp. 1053-54.

The only difference between this case and *Maier* is that the landmark buildings in New Orleans designated for preservation are apparently located in one area, whereas in New York historical buildings are apparently spread throughout the city. This distinction is without a difference since in both instances significant buildings are regulated in a similar manner. In *Maier* the issue was resolved by analyzing whether or not the regulatory action denying construction was valid. This case should be judged in the same manner.

In an analogous situation, the California Supreme Court has ruled that inverse condemnation is not an appropriate remedy to challenge the validity of a land use regulatory action, but that judicial review to determine the validity of conditions attached to development approval is appropriate. *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110. Specifically on this point, the court held:

"Nor is a cause of action in inverse condemnation stated for the denial of a building permit. The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." *Id.* p. 128.

Likewise, Penn Central desires to develop its property. Presumably the development process was not commenced with the idea of provoking a forced and unanticipated sale to New York City. As the California Supreme Court has recognized, the remedy should be one which is consistent with the landowner's objectives.

In sum, the New York City actions were regulatory in form. The substance and effect of the actions were also

regulatory since they operated as constraints on the use of the Grand Central Terminal site. Finally, judicial review for the validity of the actions taken serves Penn Central's objectives of determining whether or not and how it can make additional use of the property. For all of these reasons, the New York City actions should be considered as regulatory in nature and therefore the proper subject of judicial review for their validity. Principles of eminent domain and just compensation are not relevant.

**C. "Taking" Cases Are Not Relevant.**

In *Benenson v. United States* (U.S. Ct. of Claims 1977) 548 F.2d 939, the Court found that the sum total of governmental action aimed at preventing demolition of the Willard Hotel in Washington, D.C. so as to facilitate acquisition constituted a taking. Significantly, governmental involvement in the area of the hotel began as early as 1962. *Benenson, supra*, at p. 941. Many events occurred between 1962 and 1976. For example, there were numerous attempts to negotiate acquisition of the property. On two occasions legislation was enacted which affected the owner's use of the property. Also, during this time the government's purpose changed from demolishing the hotel to preserving it! Finally, attempts to seek approval for new uses were frustrated because of the government's desire to acquire the property. The court concluded from *all* these governmental acts that a taking had occurred. *Benenson, supra*, at p. 952.

*Benenson*, whether correctly decided or not, is completely distinguishable from the case at bar. In *Benenson* the government's intent almost from the beginning was to bring the hotel site into public ownership. Efforts by the owners to alter the building in any manner were prevented in order to preserve the government's options. The courts have

traditionally been wary of possible unfair dealings by governmental agencies in anticipation of public acquisition since the potential for abuse in affecting market value to the owner's detriment is present.<sup>3</sup> For example, in *Drake's Bay Land Company v. United States* (U.S. Ct. of claims 1970) 424 F.2d 574, the government undertook many acts to prevent development in anticipation of creation of the Point Reyes National Seashore (P.L. 87-657). The court held that the United States had acquired an inchoate interest in the property since Congress intended that the area be acquired.

This situation has arisen in the California courts as well. In *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, the County had refused to permit any development of the land in question (barring even the growth of most vegetation) while assuring the owner that the restrictions were of no consequence because the county intended to acquire the property for an airport. When, after denying the owner any use of his property for five years, the County renounced its intent to acquire the land, the appellate court concluded that due to the "exceptional and extraordinary circumstances" the property had been taken by inverse condemnation. *Peacock, supra*, at p. 854. See *HFH Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 517 at fn. 14.

*Benenson* is also distinguishable since the hotel involved there was forced to close, and the Court concluded that the owners could make no economic use of the property as a result of the governmental actions. In the instant case the Appellate Division of the New York Supreme Court made

3. The other circumstance where a taking is found is where governmental action, purportedly only a regulation of use, results in physical use of private property. *United States v. Causby* (1946) 328 U.S. 256.

a finding of fact that Penn Central had failed to meet the burden of establishing that the terminal was incapable of earning a reasonable rate of return. City's motion to dismiss at p. 25. The New York Court of Appeals certainly did not reject this finding. It seems apparent that Penn Central simply failed to carry the burden of proof. *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594.<sup>4</sup>

*Benenson, supra*, at p. 947, relied on other cases which are not applicable here. In *United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155, the particular action was upheld without any requirement of just compensation; it is hardly a sound case upon which to base a taking conclusion. *Bydlon v. United States* (U.S. Ct. of Claims 1959) 175 F. Supp. 891, involved a total deprivation of all access to property, a classic taking case. In *Eyherabide v. United States* (U.S. Ct. of Claims 1965) 345 F.2d 565, the owner sought compensation for a taking of a tract of land surrounded on three sides by a Navy gunnery range. The facts recite a history of the property being shelled by military projectiles, etc. *Id.* pp. 568-569. It is more than apparent that the case is a classic example of appropriation of property by the government, an act which requires compensation under the Fifth Amendment. *Id.* p. 567. The precedential value of *Brown v. Tahoe Reg. Plan. Agcy.* (1973) 385 F.Supp. 1128, has been eliminated since the same judge subsequently held that no cause of action in inverse condemnation could be stated against the Tahoe Regional Planning Agency. *Western Internat'l Hotels v. Tahoe Reg. Plan. Agcy.* (1975) 387 F.Supp. 429. Moreover, the Ninth Circuit, on December 21, 1977, agreed that no inverse condemnation claim could be stated against the Tahoe Regional Planning

4. We shall suggest in III, *infra*, that remaining economic viability following regulatory action is best determined by comparing before and after market values. See generally *HFH Ltd. v. Superior Court, supra*.

Agency. *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1977) ..... F.2d ..... Regarding *Keystone Associates v. State of New York* (1975) 371 N.Y.S.2d 814, the basic decision on the underlying statute was rendered in an earlier New York Court of Appeals opinion. *Keystone Associates v. Moerdler* (1966) 278 N.Y.S.2d 185. Involved was a building occupied by the Metropolitan Opera Association for some 83 years. The new owner, Keystone, intended to demolish the building and erect a 40 story office building on the site. Legislation enacted by New York created a private corporation and vested it with the power to condemn the particular property and appropriate it for use as an auditorium. Of great significance, the court viewed the statute as an exercise of the power of eminent domain:

"Since this is clearly and explicitly a condemnation statute, the question is to what extent, pending exercise of the power of condemnation, the Legislature may interfere with the rights of property owners to build upon or improve their property." *Id.* p. 188.

The statute was aimed at a particular piece of property for the sole purpose of acquisition. The court even concluded that the statute was not intended to protect public health, safety, and welfare as those terms are commonly understood. *Id.* p. 188. Thus, as with *Benenson*, the *Keystone* line of cases have no applicability to the present situation.

Penn Central has cited *United States v. General Motors Corporation* (1945) 323 U.S. 373, in support of the argument that just compensation is required for the taking of private property. Jurisdictional statement at pp. 14 & 18. A mere statement of the issues serves to demonstrate the inapplicability of *General Motors*:

"This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict. [footnote omitted] *The problem*

*involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease." Id. pp. 374-75 (emphasis added).*

*General Motors* plainly involved the amount of required compensation where a taking had already occurred. The issue in the present case is whether there has been a valid exercise of the police power.

Finally, *Texas Antiquities Committee v. Dallas County Community College District* (1977) 554 S.W.2d 924 is not relevant since the opinion dealt only with historical buildings controlled by public agencies and, in any event, the court struck down the statute since it lacked reasonable standards. *Id.* pp. 926-27.

In sum, New York City has not evidenced any desire to acquire Grand Central Terminal. Rather, the City has sought to regulate alterations to the site under prescribed standards. This combined with the absence of any pre-condemnation activity or actual public use eliminates the possibility that the regulatory actions of the City should be treated as exercises of the power of eminent domain.

## II

### **JUDICIAL REVIEW IN THIS CASE SHOULD BE FOR THE PURPOSE OF DETERMINING WHETHER THE ACTIONS OF NEW YORK CITY ARE VALID OR WHETHER THEY CONSTITUTE A VIOLATION OF DUE PROCESS AND ARE THEREFORE INVALID.**

#### **A. Established Law Holds That Improper Exercises of the Police Power Will Be Voided by the Courts Without the Additional Requirement That Affected Property Owners Be Given Just Compensation.**

The New York Court of Appeals has aptly phrased the principle to be discussed in this section. In *Fred F. French*

*Investing Co., Inc. v. City of New York*, *supra*, 385 N.Y.S.2d 5, the Court stated:

"As noted above, when the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." *Id.* p. 8.

In elaborating upon the point, the *French* court quoted from Professor Costonis:

"'[T]he goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.'" *Id.* p. 9.

In *French*, a property owner sought a declaration of unconstitutionality and damages in inverse condemnation allegedly arising from the rezoning of two private parks. Under the rezoning, the parks were to be made available to the public and the air space above (development rights) was to be usable elsewhere in the Manhattan area subject

to approval by regulatory authorities and acceptance of the development rights by a qualified owner. The court held the zoning ordinance to be invalid but also held, applying the above principles, that there had been no inverse condemnation and consequently no requirement that the City pay just compensation.

Summarily stated, an exercise of the police power which would constitute a taking if enforced is a violation of due process and therefore invalid. Payment of just compensation to the landowner is not an additional condition necessary to afford complete judicial relief.

The California Supreme Court has analyzed the situation in the same manner. *Selby Realty Co. v. City of San Buenaventura*, *supra*, 10 Cal.3d 110. The essential facts are concisely stated in the opinion:

"Plaintiff is a California corporation which owns several parcels of land, some located within the County of Ventura (hereafter referred to as the county) and some within the City of San Buenaventura (hereafter the city). In 1968 the City and County adopted the Ventura Avenue Area General Plan pursuant to section 65300 et seq. of the Government Code. [footnote omitted] As required by section 65302, subdivision (b), the plan contained a circulation element indicating the general location of existing and proposed streets. It revealed a proposed extension of Cedar Street over the western boundary of one parcel of plaintiff's city property, and other proposed streets extending through plaintiff's county land.

The property upon which the proposed extension of Cedar Street was shown had been zoned for multiple dwellings by the city, and in 1970 plaintiff applied to the city for a building permit to construct a 54-unit apartment complex on that parcel. The application indicated that plaintiff intended to construct the building

upon a portion of its property which the plan outlined as the location for the proposed extension of Cedar Street. *The city denied the permit, assertedly because plaintiff refused to dedicate the extension of Cedar Street included in the plan.*" *Id.* p. 115-116. (Emphasis added.)

The California high court held that no claim could be stated in inverse condemnation, and that the only remedy was invalidation of the administrative action. This holding was reaffirmed two years later in *HFH Ltd. v. Superior Court*, *supra*, 15 Cal.3d 508. Referring to *Selby*, the Court stated:

"... we held in that case that a landowner could not employ inverse condemnation to challenge a zoning ordinance which required him to dedicate part of his land to the city as a condition of receiving a building permit. . . ." *Id.* p. 516.

In the case at bar, Penn Central complains of its inability to build an office tower. Even assuming (an assumption which seems unwarranted on the record) that the New York City actions constitute a frustration of Penn Central's property rights, the correct judicial result would be invalidation of the illegal action, not an award of just compensation.

In this regard, *Southpark Square Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, is instructive. There, the plaintiff brought an action in inverse condemnation complaining that as a result of the City's denial of a building permit, the affected property was lost in foreclosure proceedings. The permit denial was based on concern over the location of a future interchange in relation to the property and also concern that an award of compensation for the interchange would be substantially higher if the hotel plaintiff desired to build was in being when condemnation occurred. The Court held that the District Court was with-

out jurisdiction because the "claim asserted is 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Id.* p. 344. Supporting this result was the recognition that under State law, mandamus was available to compel issuance of an improperly denied building permit. *Id.* p. 344.<sup>5</sup>

This issue has been considered and resolved in the same manner by the Ninth Circuit. *Union Oil Company of California v. Morton* (9th Cir. 1975) 512 F.2d 743. In *Union Oil*, four oil companies challenged the Secretary of the Interior's suspension of certain leases in the Santa Barbara Channel. While the relief sought was to set aside the suspension, it is apparent that the court analyzed the issues raised in terms of all possible legal remedies including compensation for a taking.<sup>6</sup> The relevant discussion is found in that portion of the opinion entitled "Suspension: Regulation or Taking?". The principles there stated are equally valid here. The court concluded that the Secretary had not been granted the power of condemnation with respect to the oil leases and that without statutory authorization the Executive Branch generally has no power of condemnation. *Id.* p. 750. The current case is analogous in that New York City made no effort whatsoever to exercise whatever eminent domain power it might have. Consequently, the following direction to the trial court states the principle which should also apply here:

"If the trial court finds that the suspension, as limited by the Secretary's amended statement, complies

5. During the course of this discussion, the court observed that "other states have considered the availability of mandamus as a bar to an inverse condemnation action", citing, *inter alia*, *Selby Realty Co.*, *supra*. *Id.* p. 344 at fn. 11.

6. Under federal practice the prayer for relief is not part of the claimant's cause of action and final judgment must grant appropriate relief even though not demanded. Rule 54(c) of the F.R.C.P.; 8 Moore's F.P. para. 54.60.

with these requirements, Union's complaint should be dismissed. Otherwise, the order of suspension should be set aside as beyond the Secretary's statutory powers." *Id.* p. 752.

Again, it is seen that if a regulation affecting property is valid, compensation is not required. If such a regulation is invalid, it has no legal force. This basic principle should govern in the instant case to reject compensation claims flowing from the regulatory actions taken by New York City.

Sound reasons of public policy support this principle. In *Selby Realty Co.*, *supra*, the court observed:

"If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Id.* p. 120.

In *HFH Ltd.*, *supra*, the court, in the context of rejecting damages for losses occasioned during the judicial review process, stated:

"Courts have thus recognized that '[o]f course, it is not a tort for Government to govern . . . .' (*Dalehite v. United States* (1952)) 346 U.S. 15, 57 (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 C.2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." *Id.* at p. 519.

In *Southpark Square Ltd.* the court noted:

"A city would be unduly hamstrung if its permit decisions subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions." *Id.* p. 343.

The just cited language is particularly applicable in the present case, where the property interest in Grand Central Terminal and the development rights above the terminal have been separated for the convenience of appellants.

An additional sound reason of public policy supports the principle. Judicial recognition of inverse condemnation in a regulatory context would significantly reduce legislative control over the proper allocation of governmental financial resources. On the other hand, under the traditional judicial approach, voiding of an invalid regulation leaves the legislative body, rather than the courts, with the decision as to whether the circumstances warrant the exercise of the condemnation power and the expenditure of fiscal resources for acquisition of the property. This approach respects the proper roles of the courts and legislative bodies in determining the proper social allocation of financial resources. In *Kasser v. Dade County* (Florida 1977) 344 So.2d 928, the property owner sought rezoning of his property for a higher use. The request was denied. The owner brought an action claiming that the county had effectively taken the property without compensation. The court upheld the dismissal of the complaint on the basis that the owner had a sufficient remedy under local procedures to challenge the validity of the underlying zoning ordinance. The court stated:

"Had review been sought in the stipulated fashion and the action by the Board found to be unreasonable and confiscatory, the County would then have had the

option of rezoning the property or condemning it via its eminent domain authority. This result would have been more appropriate than that sought by the appellant herein, for the latter approach would put the County in the position of compensating a landowner who is in actuality dissatisfied with the zoning designation on his property—a designation which the appellant initially sought to change. It was the denial of that change which precipitated the instant controversy." *Id.* p. 929.

Thus the court recognized that invalidation of the zoning ordinance would give due process to the property owner and leave the County, the legislative body, with the option of whether to acquire the property by exercising its power of eminent domain.

The likely result of holding inverse condemnation to be available under the circumstances of the case at bar have been recognized:

"Clearly the threat to the governmental pocket book will intimidate legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest. Yet the threat of contingent and unplanned for, liability through inverse condemnation would, especially in these places, deter legislators from enacting the kinds of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge." Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent*

*Domain by the Courts: So-Called Inverse or Reverse Condemnation* Urban Law Annual 1-2 (1968).

Finally, in 1973, at the request of the Council on Environmental Quality, (42 U.S.C. 4342) Bossleman, Callies and Banta produced *The Taking Issue* (Council on Environmental Quality, 1973) as a study on the constitutional limits of governmental authority to regulate privately held land without payment of compensation. Some of the conclusions are worth noting:

"The ratification of the Fifth Amendment closes one chapter of history and begins another. The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." *Id.* p. 104.

• • • •

"The 'myth' of the taking clause has always lured landowners to expect more from it than prior precedents really justify." *Id.* p. 232.

• • • •

"The myth of the taking clause is inhibiting the sort of reasonable regulatory action that is needed to protect the environment while respecting the position of individual landowners." *Id.* p. 324.

**B. *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 and Similar Cases Do Not Support Penn Central.**

Penn Central has relied on *Pennsylvania Coal* for the proposition that just compensation is required in the present

case. See jurisdictional statement at p. 20. Various quotes from Justice Holmes' opinion in that case are cited by appellants.

*Pennsylvania Coal*, however, does not hold that regulation can require payment of compensation. That case involved an action for injunction to prevent the coal company from causing subsidence on the property of an individual property owner due to the company's underground mining activities. This Court set aside the injunctive relief which had been granted by the Pennsylvania courts. No question of compensation was even considered by this Court. The correct interpretation of *Pennsylvania Coal* has been stated by the California Supreme Court in *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879:

"That was an action between two private parties, the statute involved admittedly destroyed previously existing rights of property and contract as reserved between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community. In those circumstances application of the statute to the property was held to effect such diminution in its value as to be unconstitutional and beyond the legitimate scope of the police power." *Id.* p. 891. (Emphasis added).<sup>7</sup>

Other cases from several states are often cited by property owners and developers for the proposition that regulation which allegedly leaves the property owner with little economic use constitutes inverse condemnation requiring

7. The California court has also distinguished *Pennsylvania Coal* on the ground that it was decided before the principles of comprehensive zoning were established. *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 528, appeal dismissed 371 U.S. 36.

just compensation. See for example *Arverne Bay Const. Co. v. Thatcher* (1938) 15 N.E.2d 587; *Dooley v. Town Plan. & Zon. Com'n of Town of Fairfield* (1964) 197 A.2d 770; *State v. Johnson* (1970) 265 A.2d 711; *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.* (1963) 193 A.2d 232; *Commissioner of Natural Resources v. S. Volpe & Co.* (1965) 206 N.E.2d 666; *Aronson v. Town of Sharon* (1964) 195 N.E.2d 341; *Town of Hempstead v. Lynne* (1961) 222 N.Y.S. 2d 526; and *Vernon Park Realty v. City of Mount Vernon* (1954) 121 N.E.2d 517. A close examination of these cases reveals that in each instance where the purported exercise of the police power was found to be invalid as applied, the action taken was invalidated.<sup>8</sup> In none of these cases was just compensation granted to affected landowners. Typical is the following statement in *Dooley, supra*:

"In consequence, the regulations pertaining to the flood plain district can have no application to the plaintiffs' properties." *Id.* p. 775.

In conclusion, regulatory actions cannot lead to public agency liability for just compensation unless the actions were a guise for actual public use of private property or were part of a pattern of pre-condemnation activity. Since neither of these factors is present in the instant case, the regulatory actions of New York must be judged for their

8. In *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, the Court overruled a demurrer (the California equivalent of a motion to dismiss) and allowed an action brought in inverse condemnation to proceed. While the case dealt with ten acre zoning, it is apparent the Court was concerned with the possibility of actual public use of the affected property or inequitable pre-condemnation activities and thus refused to allow the case to be decided on the complaint alone. See *Eldridge, supra*, at pp. 628-29. Later cases decided by the same Court make this point clear. See *Leadership Housing v. City of Walnut Creek* (1977) 73 Cal.App.3d 611, 619-20; *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, 759.

validity. Principles of just compensation are not relevant as Penn Central can be afforded complete judicial relief via a due process determination as discussed in this brief.

### III

#### **REMAINING ECONOMIC BENEFIT TO THE OWNER, ONE OF THE FACTORS USUALLY CONSIDERED IN DETERMINING THE VALIDITY OF POLICE POWER EXERCISES, IS BEST DETERMINED BY COMPARING MARKET VALUES OF THE AFFECTED PROPERTY BEFORE AND AFTER REGULATORY ACTION.**

##### **A. The Impact of Regulatory Action on the Value of Affected Property Is But One of the Factors Which Determine the Validity of an Exercise of the Police Power.**

In *Goldblatt v. Hempstead, supra*, this Court stated:

"There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon, supra*, it is by no means conclusive, . . ." *Id.* p. 594.

This observation is borne out in cases where effect on value has not been the determining factor.

In *Sibson v. State* (N.H. 1975) 336 A.2d 239, the Court upheld the denial of a permit to fill wetlands as a valid exercise of the police power not requiring the payment of just compensation. In that case the property owners, having previously legally filled a two acre portion of a six acre tract of salt marsh, were denied permission to fill the balance of four acres. *Id.* p. 240. A judicial referee made extensive findings of fact in connection with the property, concluding that the four acres were part of a valuable ecological asset and that the proposed fill would do irreparable damage to an already diminished and irreplaceable natural asset. *Id.* p. 240. In reaching its holding, the Court specifi-

cally refused to decide the case on the basis that the plaintiffs had already received more than their purchase price from the fill and sale of the two acre portion. Rather, the Court decided the case with respect to the remaining four acres. *Id.* p. 241. The specific rule announced by the Court is as follows:

"... the State action is sustained in these cases unless the public interest is so clearly of minor importance as to make the restriction of individual rights unreasonable." *Id.* p. 242.

In rejecting concern over the effect on value, the Court observed as follows:

"The denial of the permit by the board did not depreciate the value of the marshland or cause it to become 'of practically no pecuniary value.' Its value was the same after the denial of the permit as before and it remained as it had been for milleniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit." *Id.* p. 243.

*Sibson* followed the decision of the Wisconsin court in *Just v. Marinette County* (Wisc. 1972) 201 N.W.2d 761, where it was held that prevention of the public harm which would occur from destruction of near shore areas was within the police power and that this regulatory objective could be accomplished without payment of compensation. Regarding the effect on property value, the Court stated:

"The Justs argue their property has been severely depreciated in value. But this depreciation of value is

not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

"We are not unmindful of the warning in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322:

'... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'

This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. [footnote omitted] The ordinance does not create or improve the public condition but only preserves nature from the despoliation and harm resulting from the unrestricted activities of humans." *Id.* p. 771.

In *Turner v. County of Del Norte* (1972) 24 Cal.App.3d 311, the Court upheld a flood plain zoning ordinance which prohibited permanent structures and allowed only seasonal uses. *Id.* p. 314. The Court was not particularly concerned about the impact on the value of affected owners. Instead it held:

"The zoning ordinance in question imposes no restrictions more stringent than the existing danger demands. Respondents may use their lands in a number of ways which *may* be of economic benefit to them." *Id.* p. 315 (emphasis added.)

This holding reflects the eminently sensible principle that regulation in the public interest may be validly undertaken, without requirement of compensation, in order to protect life and property. Impact on the property owner in such instances cannot be the guiding criteria. See also *Turnpike Realty Company v. Town of Dedham* (Mass. 1972) 284 N.E.2d 891, 900.

In instances where regulation has been utilized to abate nuisances, impact on value has not been the determinative factor. *Willard v. City of Eugene* (Ore. 1976) 550 P.2d 457. On other occasions, the balance between protection of the public interest and impact on private interests has favored the public notwithstanding the virtual elimination of private value. *Consolidated Rock Products Co. v. City of Los Angeles, supra*, 57 Cal.2d 515.

We have pointed out these various legal concepts because a narrow focus on the remaining economic benefit to the owner of property after regulatory action is not the exclusive criterion for determining the validity of regulatory action. It is not our contention that the impact on value is not relevant in the instant case. However, amicus firmly believes that such consideration cannot be the *only* relevant factor in determining the validity of regulatory action.

**B. Analysis of the Tests Utilized by the Courts for Determining the Remaining Economic Viability of Property After Regulation.**

**1. THE TEST FOR DETERMINING WHETHER PROPERTY AFFECTED BY REGULATORY ACTION HAS REMAINING ECONOMIC VIABILITY HAS BEEN FORMULATED IN SEVERAL WAYS.**

The New York Court of Appeals in the instant case utilized the test which requires that a landowner be capable of earning a reasonable rate of return under the landmark regulations. This concept has been formulated and applied

in other New York cases. See for example *Fred F. French Investing Co. v. City of New York, supra*. To apply this test in any given circumstance it would appear that inevitably a detailed factual inquiry must take place to identify and quantify the factors which would form the basis for a determination of whether it is possible for the property owner to realize a reasonable rate of return.

In *South Terminal Corp. v. Environmental Protection Agcy.* (1st Circuit, 1974) 504 F.2d 646, the Court rejected a claim that a taking had occurred by virtue of Environmental Protection Agency regulations which had the effect of eliminating some 1,000 planned upon parking spaces. These regulations further compelled a forty percent vacancy rate in the downtown core area. The Court stated:

"However, the government has not taken title to the spaces and the decisions about alternative uses of the space has been left to the owner. The taking clause is ordinarily not offended by the regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner." *Id.* p. 678.

Here the Court required that reasonable uses be left to the owner. See also *Nectow v. Cambridge* (1928) 277 U.S. 183, 187. Again, application of this test requires complex factual inquiries involving the innumerable factors which could be utilized as a basis for determining whether particular uses would be profitable to the owner.

It will be shown below that market value comparisons are more objective and more easily ascertained.

## 2. COMPARISON OF BEFORE AND AFTER MARKET VALUES IS THE BETTER TEST.

A comparison of before and after market values is well known to the law. In *Euclid v. Ambler Realty Co.*, *supra*, the affected parcels were allegedly worth \$10,000 free of the challenged restrictions and only \$2,500 if subject to those restrictions. *Id.* p. 384. Of course, this Court upheld the zoning ordinance there at issue without any requirement of compensation. The settled nature of this approach was acknowledged and followed by the California Supreme Court in *HFH Ltd. v. Superior Court*, *supra*, 15 Cal.3d 508. In that case, the property owners alleged that a downzoning from shopping center commercial to residential use reduced the value of the property from \$400,000 to \$75,000. *Id.* p. 512.<sup>9</sup> In upholding the downzoning without compensation, the Court observed:

"To demonstrate the settled nature of the issue before us we point out that the United States Supreme Court faced the same question in the first major constitutional challenge to modern zoning to come before it. (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016].) Tendering allegations almost identical to those urged here, the appellee in *Euclid* claimed that 'the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre. . . .' (*Id.* at p. 384 [71 L.Ed. at p. 309].) The court upheld the zoning against the claim that it constituted

9. It must be noted that this was not a mere paper loss for the owners. They had purchased the property for some \$388,000. *Id.* p. 512.

a taking of the property in question, settling some half century ago the question in the instant case." *Id.* pp. 514-515.

Precisely because of the significance of market value in determining just compensation in eminent domain proceedings, the courts in the United States are familiar with the legal principles and factual circumstances leading to determinations of market value. Therefore, comparison of the before and after market values is not only a more objective standard for determining the remaining economic viability of regulated property, but it is also very familiar to the judiciary.

Furthermore, this test, by its nature, reflects an economic value to the owner which other tests overlook. That is, an owner may sell the property and realize its economic value in that fashion. This is an option for "use" that rate of return or reasonable use approaches do not consider. The significance of this difference is illustrated by again referring to *HFH Ltd. v. Superior Court*, *supra*. In that case, the owners alleged that the zoning rendered their properties "useless" for single family residential purposes. The Court however recognized the economic significance of the substantial residual market value in upholding the zoning ordinance:

"Plaintiffs also complain of the deprivation 'of any reasonably beneficial use of the said properties commensurate with its value.' In the same section of their complaint, however, they allege a remaining fair market value of \$75,000. The substantial value of their land rebuts the allegation that they cannot enjoy any reasonably beneficial use of it. As to use 'commensurate with value,' we note the tautological quality of this statement. 'Value' is of course not an objective quality, but a social attribute of legal rights. Only if we con-

cluded that plaintiffs enjoyed a vested right in a previous zoning classification would the city's action have deprived them of a use commensurate with value; our courts have, however, clearly and frequently rejected the position that landowners enjoyed a vested right in a zoning classification." *Id.* pp. 512-513 (at fn. 2).

If the owners in *HFH* had been allowed to show that the property was useless to them in terms of their expectancy, the substantial residual value of the property if it were to be sold might have been ignored.

Comparison of market values has the added benefit of not necessitating close review of the current financial situation of the owner, whereas other tests could conceivably lead to the conclusion that if the current owner is unable to make a profitable use of the property, there is no remaining economic viability. Such tests could thus subject the validity of governmental power to the business acumen of the affected property owner, and, for that reason, are questionable. See, *Southpark Square Ltd. v. City of Jackson*, *supra*, 565 F.2d 338, 343-344. Such a result would also ignore the very valuable option of selling the property in order to realize its economic benefit.

## CONCLUSION

For all of the foregoing reasons, amicus respectfully urges this Court to reject Penn Central's contention that a taking has occurred which entitles the owners to just compensation. Rather, this case should be resolved by determining whether New York City's actions are valid exercises of the police power. Even if the actions are beyond the City's powers, the remedy is invalidation—not judicially compelled purchase of the property.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

**No. 77-444**

PENN CENTRAL TRANSPORTATION Co., *et al.*,

*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**MOTION FOR LEAVE TO FILE AND BRIEF OF  
THE NATIONAL TRUST FOR HISTORIC PRESERVATION,  
CITY OF NEW ORLEANS, CITY OF BOSTON, CITY OF SAN  
ANTONIO, NATIONAL CONFERENCE OF STATE HISTORIC  
PRESERVATION OFFICERS, DON'T TEAR IT DOWN,  
NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS,  
NATIONAL LEAGUE OF CITIES AND SIERRA CLUB  
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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Pursuant to Supreme Court Rule 42(3), the National Trust for Historic Preservation, City of New Orleans, City of Boston, City of San Antonio, National Conference of State Historic Preservation Officers, Don't Tear It Down, National Institute of Municipal Law Officers, National League of Cities and Sierra Club hereby respectfully move for leave to file the attached brief as amici curiae in support of appellees. Counsel for appellees have consented to the filing of this brief. Counsel for appellants have not consented.

The interests of Amici are as follows:

1. *The National Trust for Historic Preservation* is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 121,000 contributing members, including approximately 1,500 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation through extensive advisory and educational services. It has worked closely with many of the 500 municipalities which have enacted landmark and historic district ordinances.

2-4. *Cities of New Orleans, Boston and San Antonio.* Numerous individual landmarks and several districts of historic and architectural importance are located within these cities. To protect its distinctive character, each city has instituted historic preservation programs comparable to that of the City of New York. New Orleans, for example, has had a municipal historic preservation program since 1936, when the Vieux Carre Commission was created to protect the French Quarter. And in 1975 New Orleans established the Historic District/Landmarks Commission, with the power to designate landmarks and historic districts in the remainder of the City. The Massachusetts Legislature has declared two areas within Boston, Beacon Hill and the Back Bay, to be historic districts, and has recently established the Boston Landmarks Commission with the power

to designate landmarks and landmark districts. In 1967 the City of San Antonio enacted an ordinance providing for the designation of historic property and the creation of a Board of Review for historic districts and landmarks. And in 1974 it established an Office for Historic Preservation that helps ensure that city programs and expenditures aid historic preservation activities.

5. *National Conference of State Historic Preservation Officers* is an association which facilitates the administration of State and Federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the fifty states, the District of Columbia and five territories. Among the responsibilities of these officers are: the compilation of statewide surveys of historic resources including districts, sites, buildings, structures and objects significant in American history, architecture, archeology and culture; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program which makes Federal funds available to private groups, individuals and local governments for the preservation, stabilization, rehabilitation and restoration of buildings, sites, structures and objects.

6. *Don't Tear It Down* is a non-profit membership organization in the City of Washington dedicated to preserving those features of the built environment which have made the capital one of the most beautiful urban areas in the world and a pleasant city in which to live and work. Don't Tear It Down has played a central role in preserving and revitalizing the Old Post Office, the Willard Hotel and other well-known Washington landmarks, and in encour-

aging continued use and adaptive reuse of older buildings and structures.

7. *National Institute of Municipal Law Officers* (NIMLO), a non-profit organization established in 1935, is composed of and funded by over 1,400 municipal corporations and government units in all of the fifty states, the District of Columbia and Puerto Rico. Member municipalities participate in the organization through their approximately 6,000 chief legal officers, who have authored or enforced many of the 500 landmark and historic district ordinances that have been enacted nationwide. As Americans have developed an increasing awareness and appreciation of the historic and architectural heritage that surrounds them, they have turned for assistance in preserving these historic landmarks and districts to municipal government, the entity with the greatest stake in maintaining the quality of local life.

8. *National League of Cities* (NLC) represents more than 700 municipalities directly and over 15,000 cities indirectly through state municipal leagues. Known until 1964 as the American Municipal Association, the League was founded in 1924 by and for reform-minded state municipal leagues. The 27 United States cities with populations greater than 500,000 are all NLC direct members. In recent years considerable emphasis has been placed on revitalization of municipalities that have experienced deterioration and blight. While many tools are needed to accomplish this goal, one of the most important has been historic preservation. The League has been especially concerned with ensuring the right of municipalities to protect the well-being of their citizens through historic preservation.

9. *Sierra Club*, a non-profit corporation, is an international environmental and conservation organization with approximately 180,000 members in the United States. A

purpose of the Sierra Club is "To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general." This includes not only the natural environment, but the urban environment as well. The Sierra Club has recently reaffirmed its commitment to protecting for present and future generations a safe, healthy and congenial urban environment in which to live. Historic landmarks are an integral and inseparable part of this urban environment.

Amici have examined the issues presented in this case from a national perspective. They believe that historic preservation is vital to the welfare of this Nation and that the decision in this case will have a significant impact on the future of historic preservation generally and their programs specifically. Amici are particularly concerned because the briefs filed in this case have presupposed that land use regulations for purposes of historic preservation are different from, and less justifiable than, other land use regulations, such as zoning; concentrating solely on questions of compensation, they have therefore ignored the traditional tests which this Court has consistently applied in evaluating land use restrictions. Accordingly, Amici request that this Court grant leave to file the attached brief.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

**No. 77-444**PENN CENTRAL TRANSPORTATION Co., *et al.*,*Appellants,*

v.

THE CITY OF NEW YORK, *et al.*,*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**BRIEF OF**  
**THE NATIONAL TRUST FOR HISTORIC PRESERVATION,**  
**CITY OF NEW ORLEANS, CITY OF BOSTON, CITY OF SAN**  
**ANTONIO, NATIONAL CONFERENCE OF STATE HISTORIC**  
**PRESERVATION OFFICERS, DON'T TEAR IT DOWN,**  
**NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS,**  
**NATIONAL LEAGUE OF CITIES AND SIERRA CLUB**  
**AS AMICI CURIAE IN SUPPORT OF APPELLEES**

**Statutes Involved**

The relevant portions of the New York City Landmarks Preservation Law (N.Y.C. Charter & Admin. Code, ch. 8-A) and Zoning Resolutions are reprinted in the Appendix to the Jurisdictional Statement. (J.S. App. 76a-118a)<sup>1</sup>

<sup>1</sup> References to the Appendix filed with the Jurisdictional Statement are designated as "J.S. App." References to the Appendix are designated as "App."

When the New York City Council enacted this law, it determined that

"the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)

Specifically, the Council concluded that landmark preservation is necessary to safeguard the city's historic, aesthetic and cultural heritage, to protect and to enhance the city's attractions to tourists, and to strengthen the city's economy. N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a-77a)

The City of New York established a statutory plan pursuant to which its Landmarks Preservation Commission is empowered, after a public hearing, to designate qualifying structures of significant historic or aesthetic merit as landmarks. N.Y.C. Administrative Code § 207-2.0. (J.S. App. 84a-87a) Once such a designation has been considered by the City Planning Commission and approved by the Board of Estimate, construction, reconstruction, alteration and demolition are regulated by the Landmarks Preservation Commission. A proposed modification of a landmark will not be allowed unless the Commission finds that it will have no effect on the protected architectural features, is otherwise consistent with the purposes of the landmarks law, or is required to avoid economic hardship to the owner. N.Y.C. Administrative Code §§ 207-4.0 to -9.0. (J.S. App. 88a-104a)

### Questions Presented

1. Whether the regulation of land use for purposes of historic preservation is a permissible exercise of the state's police power, in the same manner as zoning and other urban land use regulations?

2. Whether the regulation of individual landmarks, as part of a general plan to protect and enhance such structures, is discriminatory and therefore violative of the Fourteenth Amendment?

3. Whether a limitation on the use of air rights pursuant to a historic preservation regulation is a "taking" for which compensation must be paid, even though it is conceded that the landowner can obtain a reasonable return on its investment without the use of the air rights?

### Statement

In recent years, historic preservation—the protection, rehabilitation and reuse of older buildings whose aesthetic or historic merit significantly contributes to the American landscape and culture, and to the maintenance of American cities and towns as livable places—has become a matter of great public interest and concern.<sup>2</sup> Congress, for example, has established a National Register of Historic Places and has specifically determined that

<sup>2</sup> "Organizations active in historic preservation work have more than doubled since 1966, growing from fewer than 2,500 to more than 6,000 as of June, 1975." Biddle, *Historic Preservation: The Citizens Quiet Revolution*, 8 Conn. L. Rev. 202 (1976). There are currently over 500 municipal commissions with responsibility for historic preservation. See National Trust for Historic Preservation, *Directory of Landmark and Historic District Commissions* (1976).

"the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." National Historic Preservation Act of 1966, 16 U.S.C. § 470(b).<sup>3</sup>

Similarly, all fifty states and over five hundred municipalities have enacted statutes and ordinances in one form or another, as part of land use regulations, to encourage or require the preservation and maintenance of historic places.<sup>4</sup>

The New York City ordinance at issue in this case is simply one example of the now-widespread movement to protect landmarks as part of land use legislation. And the Grand Central Terminal, the subject of this litigation, is but one of approximately 500 individual sites and 31 districts designated by the New York City Landmarks Preservation Commission pursuant to the city's general plan to preserve sites of special historic or aesthetic merit.<sup>5</sup>

The Grand Central Terminal itself was built after a nationwide competition to design a replacement for Cornelius Vanderbilt's 1871 Grand Central Depot. Pursuant to a special grant from the city, the Terminal was built in the middle of Park Avenue, a city street. The Terminal was opened to the public in 1913 and immediately attracted international acclaim, not only because of the imaginative architectural solution to the difficult engineering problem posed by having to construct the station over underground tracks, but because of the architectural design and scale of the building, and its fine Beaux Arts facade, attractive

<sup>3</sup> See also notes 25-27 *infra* and accompanying text.

<sup>4</sup> See note 24 *infra*.

<sup>5</sup> Landmarks Preservation Commission of the City of New York, *Landmarks and Historic Districts* (1977).

sculptured details and imposing statues of Mercury, Hercules and Minerva atop the Forty-Second Street facade.<sup>6</sup> Indeed, as the New York Supreme Court, Appellate Division, found in this case:

"Grand Central Terminal is an important and irreplaceable component of the special uniqueness of New York City. It is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents." (J.S. App. 47a)

On August 2, 1967, pursuant to the landmarks law and after several public hearings, the New York City Landmarks Preservation Commission designated the Grand Central Terminal as both a landmark and a landmark site. (R 2240-41) The Commission's designation of the Terminal and the confirmation on September 21, 1967 of that designation by the New York City Board of Estimate were never challenged and are not at issue here.

On January 22, 1968, well after the designation of the Terminal as a landmark, the Penn Central Transportation Company, certain of its subsidiaries and UGP Properties, Inc., appellants in this case,<sup>7</sup> entered into a lease and sublease arrangement for the purpose of constructing a 56-story office building atop the Terminal. In accordance with the landmarks law, Penn Central submitted to the Landmarks Preservation Commission several designs for the office tower, one of which would have preserved the Terminal's facade underneath the 56-story tower and two others which would have demolished the facade. After a

<sup>6</sup> Photographs of the Terminal appear at pages 2232, 2234, 2236 and 2238 of the Record on Appeal to the New York Court of Appeals (hereinafter "R").

<sup>7</sup> Appellants are sometimes jointly referred to as "Penn Central."

hearing, the Landmarks Preservation Commission concluded that the proposed office tower would not be appropriate to, or consistent with, the effectuation of the purposes of the landmarks law and would have a harmful effect on the Terminal. (R 2242-55). The Commission refused to issue the necessary certification, thus precluding Penn Central from constructing its proposed addition.

Penn Central did not administratively appeal the Landmarks Preservation Commission's action. Instead, it initiated this lawsuit, claiming that the landmarks law is unconstitutional on its face and as applied, and seeking compensation for a "taking" of its property.

The New York Supreme Court, Trial Term, ruled in appellants' favor, at least in part on the theory that landmark preservation is not within the state's police power. (J.S. App. 71a).<sup>8</sup> The New York Supreme Court, Appellate Division, reversed and, with two dissents, concluded that landmarks preservation regulations, like other land use regulations, are an appropriate exercise of the police power. (J.S. App. 26a)

Pursuant to New York procedure, the Appellate Division also made *de novo* findings of fact, which are not challenged before this Court. The Appellate Division found, *inter alia*, that Penn Central failed to prove that it cannot obtain a reasonable return on its investment in the Grand Central Terminal, or that it has no reasonable use of its property without the construction of the proposed office tower.<sup>9</sup> (J.S. App. 48a-50a) Accordingly, applying traditional tests adopted by this Court, the Appellate Division found that

<sup>8</sup> This opinion is not officially reported but is reprinted at J.S. App. 51a-73a.

<sup>9</sup> The Terminal was designed as, and continues to function as, a railroad station. In addition, it has numerous shops, stores and

there has been no taking. (J.S. App. 24a-28a)<sup>10</sup> A unanimous New York Court of Appeals affirmed.<sup>11</sup>

This Court then noted probable jurisdiction.

### Summary of Argument

Penn Central's argument to this Court is simple. The City of New York, through application of its landmarks law, has prevented Penn Central from constructing a 56-story office tower in the air space over the Terminal, thereby depriving Penn Central of the use of its air rights and, consequently, of considerable income. *Ipso facto*, Penn Central argues, the city's action constitutes a "taking" for which just compensation must be paid. Penn Central's claim is, in essence, that whenever a landmark statute prevents a property owner from using air space in a way which would maximize his profits, he is entitled to just compensation. (Penn Central Brief at 9-11)

Acceptance of Penn Central's claim would make historic preservation a virtual impossibility because any limitation on property use for aesthetic or historic purposes could be accomplished only by eminent domain. Indeed,

eating facilities, from fast food operations to a well-known restaurant, the Oyster Bar. Thus, the station produces over a million dollars each year in rental income. In addition, the Penn Central has had the use of the tracks for its railway business. Moreover, the City of New York has provided tax relief amounting to some \$11 million from property taxes attributable to the portion of the Terminal used for transportation purposes. (R 2088, 2090, 2213-18 (Exhibit 41) and 2225 (Exhibit T))

<sup>10</sup> The opinion of the Appellate Division is reported at 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975), and is reprinted at J.S. App. 16a-50a.

<sup>11</sup> The Court of Appeals opinion is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), and is reprinted at J.S. App. 1a-15a.

under the argument urged by Penn Central, the Federal Government would be liable to every landowner in the City of Washington because, to protect the beauty of the capital, it has enacted a height limitation precluding any person from building a 56-story office tower on his property.<sup>12</sup> Moreover, while the present case involves a limitation imposed for landmark purposes, the logic of much of Penn Central's argument would apply equally to any land use regulation.

Penn Central's absolutist view entirely ignores the long line of cases from this Court which uniformly hold that a state may use its police power to regulate land use, and in the process limit an owner's use of his property, without exercising its powers of eminent domain. *E.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73-84 (1976) (Powell, J., concurring). As this authority makes clear, no compensation is necessary provided the regulation is for a permissible public purpose, is not discriminatory and does not deprive the landowner of all reasonable use of the regulated property. The New York City landmarks law as applied to the Grand Central Terminal plainly meets these requirements.

First, historic preservation is a legitimate use of the police power. An important premise which underlies all of Penn Central's arguments is the notion that governmental regulation of land use for historic preservation purposes is in some way different from, and less justifiable than,

<sup>12</sup> D.C. Code § 5-405.

land use regulation for other purposes, such as zoning, fire protection and the like. Thus, without quite saying so, Penn Central assumes that the New York City landmarks law is not a proper use of the police power and must be tested as an exercise of eminent domain. There is no authority for such an assertion.

The fact that historic preservation laws are a relatively recent development does not make them beyond the use of the police power. These regulations, which are not significantly different from zoning laws, are merely another example of land use regulation. As this Court noted long ago, "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Village of Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 386-87.

Moreover, the legislature is the main guardian of public needs to be served by social legislation, and a legislative determination that the public welfare requires the use of the police power to regulate land in a particular manner is "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). In this case, pursuant to enabling legislation enacted by the State of New York, the New York City Council has specifically determined that the public welfare requires historic preservation, for both aesthetic and economic reasons. This judgment, in accord with that of numerous other states and municipalities, is certainly permissible.

Indeed, this Court so held in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). In *Dukes*, New Orleans had enacted an ordinance "'to preserve the appearance and custom valued by the [French] Quarter's residents and attractive to tourists.'" The Court concluded that the legitimacy of the use of the police power for such an ob-

jective was "obvious." 427 U.S. at 304. See also *Village of Belle Terre v. Boraas*, *supra*, 416 U.S. at 9; *Berman v. Parker*, *supra*, 348 U.S. at 33; *Roe v. Kansas*, 278 U.S. 191 (1929); *United States v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896). Thus, there can be no doubt that the enactment of landmark regulations is well within the scope of a state's police power.

Second, single landmark designation is not discriminatory. Penn Central suggests that, even if limitations on development imposed by historic preservation legislation are valid for districts, legislation which designates and attempts to preserve single landmarks is discriminatory and unconstitutional. (Penn Central Brief at 23) Penn Central's argument apparently is that such designations are discriminatory because they treat the Grand Central Terminal differently from non-landmark property located nearby.

But as this Court noted in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), the "crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Different treatment of similarly located buildings, one of which has great historical or architectural significance, and one of which has none, is precisely within the rule of *Mosley*. As previously discussed, preservation of historic buildings is a legitimate governmental goal. The differential treatment of landmarks and non-landmarks is obviously central to this goal. There is, therefore, a rational basis for the different treatment and no impermissible discrimination. *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303-04; *Queenside Hills Realty Co. v. Saxl*, *supra*, 328 U.S. at 83-85.

Third, under the standards consistently applied by this Court, there has been no taking and compensation is not required. Every regulation which prevents a landowner from making the most beneficial use of property and precludes maximizing profits deprives that owner of revenue he might have had under other circumstances. But this Court has repeatedly held that where the regulation is "otherwise a valid exercise of the . . . police [power]," no compensation need be paid unless the regulation so interferes with the property as to deprive the owner of all reasonable use. *Goldblatt v. Town of Hempstead*, *supra*, 369 U.S. at 592; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

In the present case, the New York Supreme Court, Appellate Division, has found as a matter of fact that Penn Central failed to establish that the landmark regulation deprived it of all reasonable use of the Terminal or, indeed, limited its ability to make a reasonable return on its investment. (J.S. App. 48a-50a) Penn Central concedes that point in this Court. (Jurisdictional Statement 7, n.7) Accordingly, there has simply been no taking.<sup>13</sup>

<sup>13</sup> As other briefs have discussed at length, the New York Court of Appeals concluded that there was no taking because, *inter alia*, only that portion of the property value which was created by "the efforts of the property owner" need be considered. (J.S. App. 1a-2a, 9a) On the facts of this case, where the property involved is a railway station, built on a city street by special grant, subsidized for many years by property tax deductions and subject to a complicated interlocking scheme of Federal, State and local subsidies, such a rule may well be appropriate. However, Amici have not relied upon the grounds set forth by the New York Court of Appeals because they believe that the traditional analysis adhered to by this Court without exception over the past seventy-five years requires affirmance of the result reached below.

Similarly, a number of other briefs have dealt at length with issues related to the New York City transfer of development rights

Penn Central, attempting to avoid the dilemma which the lower court's findings pose, claims that its air rights have been entirely eliminated and that the making of a reasonable return on the Terminal itself is immaterial. (Penn Central Brief at 26) Air rights, however, are not separate property. Rather, it is always the case, when a landowner has built to a maximum height limitation, that his use of further air space is necessarily precluded. Similarly, a set-back or side lot regulation prevents a landowner from building on those portions of his property. Yet imposing a height limitation or requiring open space has never been thought to require compensation. Indeed, this Court faced and resolved these questions several years ago when it concluded that "the police power may limit the height of buildings, in a city, without compensation," *Hudson County Water Co. v. McCarter*, *supra*, 209 U.S. at 355, and that limiting an owner to the use of only a portion of his property is unobjectionable. *Gorieb v. Fox*, 274 U.S. 603 (1927).<sup>14</sup>

as applied to the Terminal. Amici have not discussed these rights in detail because they believe that, while the city has been generous by rewriting its laws specially to provide additional benefits to Penn Central (App. 68-69), there is no taking in the present case whether or not any transfer of development rights are provided to Penn Central. It is worth noting, however, should this Court reach the issue, that it is hardly novel to suggest, as did the New York Court of Appeals, that the transfer of development rights would themselves be full compensation to Penn Central if any compensation were due. As this Court held in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-51 (1974), a property owner may be required to accept other interests in kind, such as realty, as compensation where a taking does occur.

<sup>14</sup> Consequently, the various eminent domain cases cited by Penn Central throughout its brief are irrelevant. Each of those cases involved a situation where the governmental authority either appropriated property for its own use, precluded the landowner from any reasonable use of the property, or both. See, e.g., *United States v. Fuller*, 409 U.S. 488 (1973); *United States v. Causby*, 328 U.S. 256 (1946).

For all these reasons, the result reached by the New York Court of Appeals is correct and its decision should be affirmed.

## ARGUMENT

### I. Historic Preservation Is a Legitimate Use of the Police Power.

Over fifty years ago, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court held that a municipality could place restrictions on land use without providing compensation. The Court observed:

"[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

The threshold question in each case is whether the particular restrictions on land use constitute a valid exercise of the police power. As the Court in *Euclid* also noted, such restrictions must be considered a valid exercise unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395.<sup>15</sup>

<sup>15</sup> *Accord*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73-74 (1976) (Powell, J., concurring); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927).

This Court, as well as several state and federal courts, Congress and numerous state and municipal legislative bodies, has concluded that the preservation of historic sites and districts substantially promotes the general welfare of the public. Consequently, historic preservation, as embodied in New York's Landmarks Preservation Law, is a valid exercise of the police power.<sup>16</sup>

**A. The State Authorities' Conclusion that Historic Preservation Promotes the General Welfare Is Virtually Conclusive.**

This Court has repeatedly noted that the police power "embraces an almost infinite variety of subjects,"<sup>17</sup> and that it extends to all matters of public concern. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952). For example, in *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946), the Court pointed out that:

"Many types of social legislation diminish the value of the property which is regulated . . . . But in no

<sup>16</sup> Penn Central does not consider the question of whether landmark preservation laws are a legitimate use of a state's police power. Rather, stating that "this is not a zoning case," Penn Central simply ignores *Euclid* and assumes that the police power is unavailable. (Penn Central Brief at 20-23)

Penn Central wholly misconceives the nature and purpose of landmark preservation laws. See pages 25-26 *infra*. In any case, these supposed distinctions are irrelevant. The threshold question before this Court is not whether landmark preservation laws resemble other valid exercises of the police power. Rather, it is whether such laws are themselves a valid exercise of this power. See Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 Harv. L. Rev. 402, 415 (1977). Zoning ordinances, for example, are different than regulations which preserve the nation's natural resources. Yet, such regulations are as valid an exercise of the police power as zoning ordinances. See *Walls v. Midland Carbon Co.*, 254 U.S. 300, 324 (1920) (natural gas). See also note 28 *infra*.

<sup>17</sup> E.g., *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 192 n.5 (1968); *Munn v. Illinois*, 94 U.S. 113, 145 (1877).

case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws . . . . The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." 328 U.S. at 83.<sup>18</sup>

And in *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977), Justice Powell noted that: "[C]ases [subsequent to *Village of Euclid v. Ambler Realty Co.*, *supra*] have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes." See also *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

The primary responsibility for determining which measures will promote the public welfare lies with the state, and substantial deference must be paid to the state's judgment. "[T]he settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927).<sup>19</sup> In fact, as long as the legislative determination

<sup>18</sup> The fact that Penn Central acquired its air rights in Grand Central Terminal prior to the enactment of the Landmarks Preservation Law is, of course, irrelevant. As this Court concluded in *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), "regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it."

<sup>19</sup> "The statement of the rule in *Zahn* remains viable today." *Moore v. City of East Cleveland*, *supra*, 431 U.S. at 514 n.1 (Stevens, J., concurring). See also *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888) (legislature has wide power to determine what the public welfare demands). In *Gorieb v. Fox*, *supra*, the Court,

is "fairly debatable the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 388.<sup>20</sup> The state's legislative declaration of what the public interest requires is, in short, "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).<sup>21</sup>

The landmarks law at issue here was passed under the New York State Historic Preservation Enabling Act of 1956.<sup>22</sup> The State law declared the preservation of landmarks to be public policy of the state, and granted municipi-

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referring specifically to land use restrictions and the *Village of Euclid* decision, explained:

"State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." 274 U.S. at 608.

<sup>20</sup> See also *Goldblatt v. Town of Hempstead*, *supra*, 369 U.S. at 595, quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932) ("debatable questions as to reasonableness are not for the courts but for the legislature . . .").

<sup>21</sup> This same deference must be paid to the determinations of the state courts. For example, in *Welch v. Swasey*, 214 U.S. 91 (1909), the appellant attacked an ordinance which limited the height of buildings in certain areas of Boston. The Massachusetts courts upheld the ordinance as a valid exercise of the police power and this Court affirmed, noting that whether the ordinance will "promote the general and public welfare . . . [is a matter] which the state court is familiar with, but a like familiarity cannot be ascribed to this Court." 214 U.S. at 105. Consequently, the Court concluded it has

"the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. . . . [The State court determination] will only be interfered with . . . where the decision is, in our judgment, plainly wrong." 214 U.S. at 106.

<sup>22</sup> N.Y. Sess. Laws ch. 216 (McKinney 1956), *amended and re-enacted* as N.Y. Gen. Mun. Law § 96a (McKinney Supp. 1974-75).

palities the authority to use the police power to provide for the protection and preservation of buildings and places of "special historical or aesthetic interest or value." When the City of New York enacted its landmarks law, it determined specifically that historic preservation was within its police power, declaring that the landmarks law was "required in the interest of the health, prosperity, safety and welfare of the people." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)<sup>23</sup>

In sustaining the landmarks law, the New York Supreme Court, Appellate Division, concluded that the law served the economic and aesthetic purposes set forth above. (J.S. App. 18a, 23a-24a) Indeed, the court specifically found that the "preservation of landmarks in urban areas is of special importance" and that the "need to preserve structures worthy of landmark status is beyond dispute." (J.S. App. 47a)

The New York City legislative and judicial authorities are not alone in their judgment that historic preservation promotes the general welfare of the public. As the Fifth Circuit observed in *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976):

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<sup>23</sup> This general declaration is followed by a more explicit statement of the purposes which the law was designed to foster. According to the City Council, the law is intended to "effect and accomplish the protection, enhancement and perpetuation of . . . improvements and landscape features and of . . . districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history;" "safeguard the city's historic, aesthetic and cultural heritage;" "stabilize and improve property values;" "foster civic pride in the beauty and noble accomplishments of the past;" "protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided;" "strengthen the economy of the city;" and "promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)

"Throughout the country, there appears to be a burgeoning awareness that our heritage and culture are treasured national assets. Many locales endowed with historic sites have enacted protective measures for them." 516 F.2d at 1060.

In fact, as previously noted, all fifty states and over five hundred municipalities have enacted historic preservation statutes or ordinances in one form or another.<sup>24</sup> And, as discussed below, the state courts have uniformly concluded that historic preservation is a legitimate exercise of the police power. See page 22 *infra*.

The Federal Government has likewise recognized that the preservation of landmarks and other historical sites is a matter of vital public importance. The executive agencies of the Federal Government have been directed by presidential order to consider landmark preservation in effecting their responsibilities. See Executive Order No. 11593, *Protection and Enhancement of the Cultural Environment*, 3 C.F.R. § 154.<sup>25</sup> Moreover, when Congress enacted the National Historic Preservation Act of 1966, 16 U.S.C. § 470,<sup>26</sup> it declared

<sup>24</sup> See National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976). A number of state statutes and municipal ordinances are cited in the Jurisdictional Statement at 9, n.9. See also note 2 *supra*.

<sup>25</sup> Executive Order No. 11593 provides in part:

"The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government . . . shall . . . in consultation with the Advisory Council on Historic Preservation . . . institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance."

<sup>26</sup> See also 42 U.S.C. § 1460(b) (federal support for local historic preservation in urban renewal programs); Historical and

"that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people . . . ." <sup>27</sup>

It is thus plain that legislative and judicial authorities, at both the federal and state levels, have uniformly concluded that the police powers may properly be used for historic preservation purposes. And, as this Court has consistently held, substantial deference must be accorded these determinations.

**B. The Decisions of this Court Make It Clear that Historic Preservation Promotes the General Welfare.**

The decisions of this Court make it clear that historic preservation promotes the general welfare of the public and is thus a legitimate use of the police power. If there were any doubt about the matter, it was resolved recently in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). There, a New Orleans ordinance barred most pushcart vendors from the historic French Quarter. The purpose of the ordinance was "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." The Court concluded that the propriety of the use of the police power to further such an objective was "obvious." 427 U.S. at 304.

The result in *Dukes* was foreshadowed by the decisions in *United States v. Gettysburg Electric Ry.*, 160 U.S. 668

Archeological Sites Preservation Act of 1974, 16 U.S.C. § 469; Amtrak Improvement Act of 1974, 49 U.S.C. § 1653 (specifically encouraging the preservation of railway terminals).

<sup>27</sup> 16 U.S.C. § 470(b). Pursuant to this Act, an Advisory Council on Historic Preservation was established, and a National Register of Historic Places developed. The Grand Central Terminal was placed on the Register on January 17, 1975.

(1896), and *Roe v. Kansas*, 278 U.S. 191 (1929). In each case, the Court sustained the government's authority to condemn particular historic property, concluding that such action was "closely connected with the welfare of the republic itself . . . ." 160 U.S. at 682. While these cases involved eminent domain, the concept of public welfare does not vary depending upon the manner in which the government chooses to preserve the landmark. This was made clear in *Berman v. Parker*, 348 U.S. 26 (1954), where the Court used the public welfare concept, interchangeably, in its police power and eminent domain discussions.

Moreover, the Court has consistently held that those values promoted by historic preservation, see note 23 *supra*, are within the public welfare. As long ago as *Welch v. Swasey*, *supra*, the Court, in sustaining Boston's ordinance limiting building heights, held that it was appropriate to regulate property for aesthetic, as well as safety, purposes. 214 U.S. at 108. And, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court sustained an ordinance which restricted land use to "one-family" dwellings. The Court concluded that "'property rights may be cut down, and to that extent taken, without pay'" where the considerations involved are "family values, youth values, and the blessings of quiet seclusion and clean air. . . ." 416 U.S. at 9-10. In reaching this conclusion, the Court relied upon *Berman v. Parker*, *supra*, where it was held:

"The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58, 62 (1973) ("there are legitimate state interests . . . in the quality of life and the total community environment"; legislative directive valid notwithstanding claim that it involved "imponderable aesthetic assumptions"); *Young v. American Mini Theatres, Inc.*, *supra*, 427 U.S. at 73-84 (1976) (Powell, J., concurring).<sup>28</sup>

<sup>28</sup> The Real Estate Board of New York, in its amicus curiae brief (at 21-26), agrees that the police power extends to the protection of aesthetic interests. It suggests, however, that the police power is at a "greatly reduced level" where considerations of "aesthetic appearance or historic places" are involved. This is so, argues the Board, because aesthetic matters "involve considerations of subjective judgment and taste." The Board cites no authority, and Amici are aware of none, sustaining that proposition. Indeed, over a century ago in the *License Cases*, 46 U.S. (5 How.) 504, 583 (1847), where the concept of police power was first explicated, the Court indicated the exact opposite:

"[The police powers] are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. . . . [I]ts authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States." (Taney, C.J., concurring) (Emphasis supplied).

If anything, where subjective judgments are involved, legislative determinations of the propriety of the use of the police power are given particular deference. See *Paris Adult Theatre I v. Slaton*, *supra*, 413 U.S. at 62; *Young v. American Mini Theatres, Inc.*, *supra*, 427 U.S. at 71 (1976) (opinion of Stevens, J.) (the "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect"); *id.* at 80 (Powell, J., concurring) (it is "undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'"). See also note 16 *supra*.

Relying in part upon the above-cited authority the courts have uniformly concluded that historic preservation is a legitimate exercise of the police power. For example, in *Figarsky v. Historic District Commission*, 171 Conn. 198, 368 A.2d 163 (1976), the court upheld a municipal historic district ordinance, noting:

"In a number of recent cases, it has been held that the preservation of a historical area or landmark as it was in the past falls within the meaning of general welfare and, consequently, the police power." 171 Conn. at , 368 A.2d at 170.

And in *Maier v. City of New Orleans, supra*, the Fifth Circuit similarly observed that there exists "substantial [judicial] support . . . for a legislative determination to preserve historic landmarks and districts." 516 F.2d at 1059.<sup>29</sup>

In short, historic preservation promotes the general welfare and is thus a legitimate exercise of the police power. Accordingly, the impact of New York City's landmarks law upon the Grand Central terminal must be analyzed, not as an exercise of eminent domain, but under the tests applied to valid exercises of the police power, such as zoning and other land use regulations.

<sup>29</sup> E.g., *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856 (Mo. Ct. App. 1977); *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973); *Rebman v. City of Springfield*, 111 Ill. App.2d 430, 250 N.E.2d 282 (1969); *Manhattan Club v. Landmarks Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S. 2d 848 (1966); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 104 N.H. 481, 202 A.2d 232 (1964); *Vieux Carre Property Owners & Assoc., Inc. v. City of New Orleans*, 246 La. 788, 167 So.2d 367 (1964); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563 (1955); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955).

## II. Regulation of Individual Landmarks Is Not Discriminatory.

Where regulatory legislation involves economic and social issues, different treatment of persons or property is entirely permissible if there is some rational basis for distinction.<sup>30</sup> As this Court said in *Village of Belle Terre v. Boraas, supra*:

"We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of . . . [discrimination if the law] bears 'a rational relationship to a [permissible] state objective.'" 416 U.S. at 8.

Thus, all that is required to sustain a regulation such as New York City's landmarks law against a charge of discrimination is that there be an "appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also *Morey v. Doud*, 354 U.S. 457, 463-64 (1957).

It seems clear that differential treatment of similarly located buildings, one of which has great historical or architectural significance and one of which has none, is rationally related to the city's legitimate plan<sup>31</sup> to protect structures of particular historic or aesthetic merit. Consequently, the different treatment of landmarks and

<sup>30</sup> There is no claim in the present case that the regulation involves any invidious classification, such as race, or impacts upon any specially protected right, such as freedom of speech. Accordingly, claims of discrimination in this instance are subject to the rational basis test. *City of New Orleans v. Dukes, supra*, 427 U.S. at 303; *Village of Belle Terre v. Boraas, supra*, 416 U.S. at 7.

<sup>31</sup> As discussed above, the preservation of sites of historic and aesthetic merit is a legitimate governmental interest.

non-landmarks has a reasonable basis and is perfectly acceptable. *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

Nevertheless, Penn Central claims that the application of New York City's landmarks law to the Grand Central Terminal should be struck down as discriminatory.<sup>32</sup> In support of this proposition, Penn Central makes several claims, each of which is both without factual basis and incorrect as a matter of law.

First, quoting from a portion of the New York Court of Appeals decision, Penn Central claims that subjecting the Grand Central Terminal to more rigorous restrictions than nearby non-landmark properties is tantamount to "discriminatory" zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations." (Penn Central Brief at 23) But, as the New York Court of Appeals observed in the remainder of the paragraph, which Penn Central omitted from its brief:

"There is, however, a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel." (J.S. App. 6a)

This Court has already recognized that a city can reasonably make distinctions based upon architectural ap-

<sup>32</sup> While Penn Central refers to the ordinance as "discriminatory," and argues that the law should therefore be held unconstitutional, it never explicitly makes an argument in terms of the Equal Protection Clause of the Fourteenth Amendment. (Penn Central Brief at 23)

pearance, charm and beauty, and historic merit of buildings and areas. *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303-04. See also *Queenside Hills Realty Co. v. Saxl*, *supra* (upholding restrictions imposed on buildings constructed prior to 1944). That is precisely what is done under the New York City landmarks law.

Second, Penn Central claims that the landmarks law is discriminatory because the designation of individual landmarks, such as the Terminal, is not part of a comprehensive plan. (Penn Central Brief at 23) In fact, the New York City landmarks laws is a part of the City's general urban planning and land use regulations.<sup>33</sup> As one commentator explained, New York City's landmarks program is simply "a component of . . . a [general community plan] one of whose goals includes the maintenance of the desirable features of the existing urban fabric." J. Costonis, *The Disparity Issue: A Context for the Grand Central Termi-*

<sup>33</sup> The landmark process has been established in conjunction with New York City's zoning regulations, as Penn Central has recognized by advising this Court that both the landmarks law and the zoning regulations are affected by this litigation. (Penn Central Brief at 2) Indeed, the landmark designation process goes through a review and comment procedure that is designed to make landmark regulations a part of the City's general land use regulations. Thus, while the landmarks law was being prepared and considered by the city government, the staff of the Landmarks Preservation Commission surveyed the entire city for over two years to identify landmarks. The Commission held an initial series of public hearings over an eighteen-month period at which proposed landmarks and historic districts were considered. After the hearings and further study of the buildings, landmarks and historic districts were designated by the Commission and these designations sent to the Board of Estimate for approval. Before acting, the Board received from the City Planning Commission a report on each designation and its relation "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved." N.Y.C. Administrative Code § 207-2.0 g (1). (J.S. App. 85a) See Loflin, *Zoning and Historic Districts in New York City*, 36 Law and Contemp. Prob. 363, 365 (1971).

*nal Decision*, 91 Harv. L. Rev. 402, 415 (1977). And while it is one of the three or four most important buildings in New York, the Grand Central Terminal has not been singled out for designation as a landmark. Rather, as previously noted, New York has designated 31 historic districts and some 500 individual landmarks. See page 4 *supra*.

More importantly, there is no principle which requires that to be valid a legislative enactment must be pursuant to a comprehensive plan. On the contrary, this Court has uniformly held that:

"Legislatures may implement their program step by step, . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes, supra*, 427 U.S. at 303.

See also *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).<sup>34</sup>

Finally, Penn Central argues that, unlike other land use regulations that have been held to be non-discriminatory, the burden of the landmark regulations in this case is borne entirely by Penn Central, which receives no benefit from the preservation of the Terminal. (Penn Central Brief at 23) This is simply wrong as a factual matter. Penn Central obtains the same benefits from preservation of the Terminal as do the city's other citizens—the protection of the city's

<sup>34</sup> In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), this Court concluded:

"It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful." 239 U.S. at 413.

appearance, charm and beauty and economy, which the city properly determined to be of prime importance in passing the landmarks law. *City of New Orleans v. Dukes, supra*, 427 U.S. at 303-04. And Penn Central receives unique benefits as well, transferable development rights<sup>35</sup> and the modification of normal use restrictions.<sup>36</sup>

Furthermore, as a legal matter, Penn Central's entire benefits and burdens argument simply has no place in a determination of whether the landmarks law is discriminatory. For example, in *City of New Orleans v. Dukes, supra*, this Court sustained a New Orleans city ordinance which, in order to protect the historic and aesthetic qualities of the French Quarter, and to protect the city's economy and tourist industry, prohibited pushcart vendors from operating in the Quarter. Two of the three vendors previously operating in the area were exempted from the operation of the ordinance by a grandfather clause. Obviously, the burden of the ordinance fell entirely on Dukes, the vendor who was driven out of business, and the benefits flowed to the population of the city as a whole. This Court, however, unanimously upheld the ordinance against a claim of discrimina-

<sup>35</sup> It is undisputed that because of the Terminal's status as a landmark, Penn Central has certain transferable development rights not applicable to non-landmark properties. (J.S. App. 11a-14a, 113a-18a) Penn Central claims that these rights are "uncertain" and "speculative," but does not argue that they are worthless. (Penn Central Brief at 38) The city says that these rights are worth millions of dollars, and points to the fact that Penn Central was offered \$3.5 million in 1971 in each of two separate bids by appellant UGP for the air rights. (Motion to Dismiss 27, App. 47-49) Other evidence demonstrates a significant rental value for these rights. (App. 80-82) Whatever the merit of the parties' respective positions on this point, it seems apparent that the transferable development rights have some value and hence are a benefit to Penn Central to at least some extent. The New York Court of Appeals so held. (J.S. App. 11a-13a)

<sup>36</sup> Uses may be permitted in a designated landmark that are not allowed in adjacent, non-landmark buildings. N.Y.C. Zoning Resolution § 74-711.

tion by Dukes, without so much as considering who was burdened and who was benefited. To the same effect is *Goldblatt v. Town of Hempstead, supra*, in which this Court upheld a zoning ordinance that was designed to and did prohibit the operation of a quarry, although it was obvious that the burden of the ordinance fell entirely upon the quarry owner and the benefits flowed to the town's entire populace.

In sum, nondiscrimination in the context of the present regulation means only that the distinctions drawn between properties must be rationally related to the furtherance of a legitimate state purpose. *City of New Orleans v. Dukes, supra*; *Village of Belle Terre v. Boraas, supra*. The designation and preservation of single landmarks is directly and obviously related to the legitimate goals established by the city in its historic preservation law. Accordingly, the application of the law to single landmarks such as Grand Central Terminal is not discriminatory.

### III. There Has Been No Taking in This Case.

The previous sections of this brief have demonstrated that New York City's landmarks law is a proper exercise of the police power and that its application to individual landmarks is not discriminatory. The sole remaining question, then, is whether application of the regulation to the Grand Central Terminal amounts to a taking for which compensation is required. Since Penn Central may make reasonable use of the Terminal, no such taking has occurred.

This Court long ago held that:

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking

or an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . ." *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887), quoted with approval in *Goldblatt v. Town of Hempstead, supra*, 369 U.S. at 593.

The rule has developed in this Court and elsewhere that a valid regulatory scheme pursuant to the police power does not amount to a taking unless the owner is left with no reasonable use of his property. *Hadacheck v. Sebastian, supra*; *Hudson County Water Co. v. McCarter, supra*, 209 U.S. at 355 (Holmes, J.); *Maher v. City of New Orleans, supra*, 516 F.2d at 1066; *C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974); *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 963 (1st Cir. 1972); *Pope v. City of Atlanta*, 418 F. Supp. 665, 669 (N.D. Ga. 1976). See also *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975).<sup>87</sup>

Thus, in *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. at 384, this Court sustained, as a reasonable exercise of the police power not requiring compensation, a zon-

<sup>87</sup> As the First Circuit concluded in *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1974):

"Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular and permitted way may be transferred from the original owner to another person, or to a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

ing ordinance which reduced plaintiff's property value by 75%. And in *Hadacheck v. Sebastian*, *supra*, 239 U.S. at 405, this Court approved a limitation, without compensation, which reduced the value of the property over 90%. "The cases are legion that sustained zoning against claims of serious economic damage." *Young v. American Mini Theatres, Inc.*, *supra*, 427 U.S. at 78 (Powell, J., concurring). See also *Zahn v. Board of Public Works*, *supra*, 274 U.S. at 327 (fact that without restrictive zoning market value of property would be "greatly enhanced" does not make zoning ordinance a taking).

More recently, this Court in *Goldblatt v. Town of Hempstead*, *supra*, cited the *Hadacheck* case with approval in upholding an ordinance which precluded a quarry owner from continuing his business. The Court noted that:

"Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." 369 U.S. at 592.

In the present case, the New York Supreme Court, Appellate Division, found as a factual matter that the landmark designation and the refusal to permit construction of the office tower in no way interfered with the Terminal's continued use. The court also found that Penn Central had not proven under the traditional taking tests that the use of its property was unreasonably limited or that it could not earn a reasonable return on its investment. (J.S. App. 48a-50a) Penn Central admits that these findings are final

and not disputed in this Court. (Jurisdictional Statement 7, n.7) Under the authorities cited above, these factual findings conclusively establish that there has been no taking and that no compensation need be paid.

Penn Central attempts to avoid the lower court's findings by claiming that its air rights over the Terminal have been entirely eliminated. Penn Central then cites a series of eminent domain cases, such as *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and *United States v. Causby*, 328 U.S. 256 (1946), for the proposition that it must be compensated for this "taking" of its air rights. (Penn Central Brief at 25-26)

But these cases are plainly irrelevant in the present situation. First, in *Griggs* and *Causby* the governmental authority appropriated to its own use the space above plaintiff's property for the transit of aircraft. Second, in those cases there was a clear interference with the pre-existing use of the property—that is, the noise and vibration from low-flying aircraft made the existing habitation and conduct of business on the property impossible. *Griggs v. Allegheny County*, *supra*, 369 U.S. at 86-87; *United States v. Causby*, *supra*, 328 U.S. at 259, 262 n.7.<sup>38</sup>

The City of New York's regulations do not prohibit Penn Central's use of the Terminal, nor has the City built its own office building in the air space over the Terminal. Rather, a limitation on the use of air rights by the Penn Central has been imposed absent both interference with

<sup>38</sup> For the same reasons, the other cases relied upon by Penn Central are inapposite to this case. For example, *United States v. Fuller*, 409 U.S. 488 (1973), involved a condemnation of more than nine hundred acres of land by the Government, which not only prevented the former owner from continuing to use the land, but took the right and title to the land for itself. 409 U.S. at 489.

the property below and the physical use of the air rights by the Government.

Whenever a landowner has previously built to a maximum height limitation, the further use of air space is necessarily precluded. If, as Penn Central claims, air rights are to be treated as separate property and their elimination is automatically a taking, there can be no valid height limitations. That notion, however, was rejected by this Court more than 70 years ago when it concluded that "the police power may limit the height of buildings, in a city, without compensation . . . [so long as it does not make the] building lot wholly useless." *Hudson County Water Co. v. McCarter*, *supra*, 209 U.S. at 355. Indeed, that was the precise holding of this Court in *Welch v. Swasey*, *supra*, where the City of Boston's height limitations were sustained as a reasonable exercise of the police power against a challenge virtually identical to that advanced by Penn Central.

The difficulty with Penn Central's argument is its insistence that a property owner has the absolute right to use every inch of his property and that any limitation of that right is a taking. This Court held otherwise in upholding the validity of setback regulations which required an owner to leave a portion of his property unbuilt:

"The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. . . . It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not the same extent, with the owner's general

right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life." *Gorieb v. Fox*, *supra*, 274 U.S. at 608.

These principles have been repeatedly applied by the lower courts in historic preservation and similar cases. Thus, in *Maher v. City of New Orleans*, *supra*, the Fifth Circuit sustained the New Orleans French Quarter preservation ordinance against a challenge by a landowner who had been refused permission to demolish a small cottage to erect an apartment building. Because the owner failed to demonstrate that he could make no reasonable use of the cottage, the court found that the ordinance as applied did not constitute a taking. 516 F.2d at 1066.<sup>39</sup>

Particularly illustrative of the defects of Penn Central's argument is *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). *Benenson* involved restrictions by the United States under the Pennsylvania Avenue Development Corporation Act which prohibited the owners of the Willard

<sup>39</sup> See also *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (zoning plan which precluded any development of certain properties for a period of time held not a taking); *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Ry.*, 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969) (ordinance imposing special height restrictions on property owned by the railroad in order to preserve the view from a city park and from downtown areas behind the park held permissible under the police power); *Moviematic Indus., Corp. v. Board of County Commissioners*, 349 So.2d 667, 670-71 (Fla. App. Ct. 1977); *Figarsky v. Historic District Commission*, 171 Conn. 198, 368 A.2d 163, 171-72 (1976); *First Presbyterian Church v. City Council*, 360 A.2d 257, 261 (Pa. Commonwealth 1976); *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

Hotel in Washington from demolishing the building. Because the Willard had been gutted and could neither be used in its existing condition nor economically renovated, the effect of the regulation was to prohibit any use of the property. 548 F.2d at 947-48. Accordingly, the Court held that a taking had occurred. Of course, it is precisely this factual showing that the New York courts found that Penn Central did not make.

Thus, there is simply no taking in the present case.

• • •

The rule that regulatory legislative schemes grounded in the public health, safety and welfare do not require compensation in the absence of the elimination of all reasonable use of a property is based on the rule of necessity. As this Court has recognized, if every such regulatory plan which diminished the value of an owner's property required compensation, the Federal, State and local governments would be powerless to regulate property and land use regulation would be impossible. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Hudson County Water Co. v. McCarter*, *supra*, 209 U.S. at 355. See also Note, *Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks*, 1975 Duke L.J. 999, 1019.

The same is true in the field of historic preservation. The result sought by Penn Central would, in essence, find a taking and require compensation for every property owner whose maximum potential use of his property was limited by a landmarks law. Such a rule would treat historic preservation differently from every other type of land use regulation and would, as a practical matter, eliminate historic preservation in this country. Thus, the result urged by Penn Central is not only contrary to an

unbroken line of decisions by this Court, contrary to the determination of the public welfare by the legislatures of every State and the municipal authorities of some five hundred cities and towns, but contrary to common sense and the common weal.

## CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, et al.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE  
COMMITTEE TO SAVE GRAND CENTRAL STATION, ET AL.,  
AMICI CURIAE IN SUPPORT OF THE CITY OF  
NEW YORK, ET AL., APPELLEES**

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February 28, 1978

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MOTION FOR LEAVE TO FILE BRIEF ON  
BEHALF OF THE COMMITTEE TO SAVE  
GRAND CENTRAL STATION, ET AL.,  
AMICI CURIAE IN SUPPORT OF THE  
CITY OF NEW YORK, ET AL., APPELLEES

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Pursuant to Supreme Court  
Rule 42(3), the Committee to Save  
Grand Central, the Municipal Art  
Society of New York, The American  
Institute of Architects and the

other organizations listed on the schedule  
annexed to the attached brief as Exhibit  
A, hereby respectfully move for leave to  
file the attached brief as amici curiae  
in support of the City of New York, et al.,  
appellees. Counsel for appellees have  
consented to the filing of this brief.  
Counsel for appellants have not consented.

Interests of Amici

The Committee and the other  
participants in such brief amicus move  
to submit it because this proceeding  
addresses at least two questions of the  
utmost significance to them: first,  
whether New York City can protect one  
of the landmark buildings most important  
to its continuing identity and function  
as a business and cultural capital of

international importance; and, second, whether New York City and other local governments across the nation can be permitted under the Constitution to devise reasonable regulations intended to protect the nation's cultural and historic heritage.

Participants with the Committee in this brief are organizations which have in the course of the last 85 years made the quality of New York's built environment their first concern and have, among other things, been instrumental in the design and enactment of New York's Zoning Resolution and Landmarks Preservation Law, the statutes in question in this proceeding. The Committee and other participants in this brief have participated as amici curiae in each of the proceedings below in this case.

They believe that a decision by this court based on the record of this case which would nevertheless reverse the New York appellate courts and find for appellants, would eviscerate the Landmarks Preservation Law, license the destruction of Grand Central Terminal and arrest perhaps once and for all the critical national effort now underway to find effective, practicable means to preserve our national heritage.

An evaluation of the extraordinary historic, cultural and economic importance of Grand Central Terminal is set forth in the brief of the City of New York, in the section "Background of the Case." Summaries of the interests of each of the participants in this

brief amicus are attached to the  
attached brief as Exhibit A.

Because of the extraordinary  
importance of this proceeding and because  
of their interests in it, the Committee  
and such other participants respectfully  
request that this Court grant them leave to  
file the attached brief.

Respectfully submitted,

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Preliminary Statement

This is an appeal from a  
decision of the New York Court of Appeals  
approving an application of New York  
City's Landmarks Preservation Law\* to  
protect Grand Central Terminal from  
development plans which would have  
destroyed its character as one of New  
York's and the nation's most important  
landmarks.

The Court of Appeals approved  
that application when it unanimously  
affirmed the decision of the intermediate

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\* New York City Charter and Administrative  
Code, Ch. 8-A. The relevant portions  
thereof and of the New York City Zoning  
Resolution are set forth in the Appendix  
to the Jurisdictional Statement (JSA  
76a-118a.)

appellate court, the Appellate Division, holding that the Landmarks Preservation Law in its application to the Terminal did not deprive appellants of their property without due process of law. The Appellate Division reached its decision, reversing the trial court, on the basis of its review of the factual record in which appellants had not met their burden of proving that the regulation unreasonably interfered with their use of their property.

The findings of fact entered by the Appellate Division are set forth in the Appendix to the Jurisdictional Statement (hereinafter cited as "JSA") at pp. 46a-50a. The opinion of the Appellate Division (JSA 27a) is reported at 50 A.D. 2d 265, 377 N.Y.S.

2d 20 (1st..Dept. 1975) and the opinion of the Court of Appeals (JSA 1a-15a) at 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, 366 N.E. 2d 1271 (1977). The opinion of the Trial Term (JSA 51a-73a) is not officially reported.

#### Question Presented

May the appellants, owner and prospective developer of a landmark railroad terminal of national historic importance, having failed to prove that the landmark as regulated is incapable of earning them a reasonable economic return from the uses for which they maintain it and for which it is admirably adapted, nevertheless require public payment for so much of the additional value of the Terminal as they are unable to realize because a local preservation

regulation prevents them from exhausting its development potential?

Statement of the Case

In this appeal appellants attack rulings of the New York appellate courts which found in effect:

A. that Grand Central Terminal is a fully functional railroad terminal duly designated as a landmark of New York City in accordance with the provisions of the New York City Landmarks Preservation Law;

B. that on the basis of the factual record made by appellants in their attack on the constitutionality of the Landmarks Preservation Law as applied to the Terminal, the appellants had failed to meet their burden of proving

that the Terminal as regulated was incapable of earning them a reasonable economic return, even though that law prevents them from exhausting the development potential of the Terminal by erecting a 57 story speculative office tower directly above it.

The Proceedings Below

The facts on which these determinations were made are not in dispute in this appeal\* and are set forth in the findings of fact made by the Appellate Division. In those findings of fact the Appellate Division reviewed the evidence of economic hardship presented by appellants in their

---

\* Appellants and appellants' amicus, the Real Estate Board of New York, nevertheless make various representations with respect to the facts which

effort to show the unconstitutionality

(Footnote continued from previous page)

are not supported by the record. Notable among these is appellants' misleading assertion to this Court that Grand Central Terminal "is physically 'deteriorating at a substantial rate'" (Appellants' Brief 4). To the extent this statement is intended to represent the current situation of the Terminal, it is wrong as a matter of public record, in major part because of very substantial public investments in the Terminal. (N.Y. Times, January 29, 1978, P.D-25; Hardy, Holzman, Pfeiffer, "Saving Grand Central Terminal or The Future of Midtown Manhattan", 30 Journal of Architectural Education 17 (1976). Appellants also assert (Appellants' Brief 5) that "Penn Central was guaranteed at least \$3,000,000 per year" as rental for the office tower from the developer. The term "guaranteed" is a substantial overstatement. The developer, a subsidiary organized for the purpose of the office tower project did undertake to pay such a minimum rent -- but the record is devoid of any evidence that the developer had any financial resources to support this undertaking other than the hoped-for profits from the office tower. Appellants' amicus, the Real Estate Board of New York, premises its argument to this Court on the assertion that Penn Central was suffering losses on the Terminal. (Brief Amicus Curiae of the Real Estate Board of New York, 8 and Point I(a) 16-27.) This claim was expressly rejected by the Appellate Division. (JSA 25a-26a).

of the Landmarks Law and expressly found it insufficient.

To reach this determination the Appellate Division repeated a basic acknowledgment of

"the right, within proper limitations, of the State to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community." (JSA 23a).

It rejected the contrary suggestion of the trial judge that "any regulation of private property to protect landmark values constitutes a compensable taking" (JSA 23a) noting that such a rule would "eviscerate" the legislature's scheme (JSA 23a). Rather, it said the problem was one of deciding whether the law "as applied to [appellants] in this case, imposes such a burden as to constitute

a compensable taking" (JSA 23a), the burden of proving the necessary degree of hardship being on appellants.

The Appellate Division found the considerations to be taken into account in evaluating the effect of the statute in the decision of this Court in Goldblatt v. Hempstead, 369 U.S. 590 (1962). There this Court called for consideration of the relationship of the underlying legislation to the public good, the reasonableness of the regulation in achieving its end and the effect of the regulation on the economic viability of the parcel involved.

In applying these standards the Appellate Division found the appellants' evidence of hardship seriously deficient. Among other things, it

found that appellants still had the use of the Terminal for purposes essential to their railroad business and for which they continue to operate it--uses for which the Terminal in its regulated form is excellently adapted. Secondly, directly on the question of the economic viability of the Terminal as regulated, the court found the appellants' own "Statement of Revenues and Costs" seriously inadequate. In it, the court pointed out, appellants had improperly charged "huge cost items" to the Terminal without distinguishing costs properly attributed to the landmark from costs properly attributed to appellants' railroad operations generally. And, it pointed out, appellants had credited the Terminal only with income from concessions, imputing "no rental

value whatsoever . . . to the vast space in the terminal devoted to railroad purposes," spaces which had value to appellants and which could have value to others. In addition the court noted that they took no account of the additional economic value which had been preserved for them by provisions of the New York City Zoning Resolution which permitted them to use its potential for office development on adjacent sites also owned by them. It cited also the fact that they had not shown that the arrangements whereby the State of New York relieved them of all losses on certain of their railroad operations were anything but beneficial (JSA 25a).

The Court of Appeals unanimously affirmed these findings of fact

and the conclusions of law reached by the Appellate Division on the basis of them, namely, that appellants had not met their burden of proving that the Landmarks Law imposed on them an unconstitutional hardship.

The Court of Appeals at the very outset stated the problem as a matter of

"determining the scope of governmental power, within the Constitution, to preserve, without resorting to eminent domain, irreplaceable landmarks deemed to be of inestimable social or cultural significance." (JSA 1a)

The test of the scope of the regulatory power it found in the undisputed principle

"rooted in the Due Process Clause of the Constitution, that government may not, by regulation, deprive a property owner of all

reasonable return on his property." (JSA 1a)

In going on to focus on the difficult and complex determination of what constitutes a reasonable return under this test, the Court repeatedly noted that this was a case involving the Due Process clause, not a case involving an exercise of the power of eminent domain under the just compensation clause.\* It then

---

\* Appellants' restatement of the holding of the Court of Appeals (Appellants' Brief 12) is wrong. It ignores the distinction made by the Constitution and respected by the Court of Appeals between regulations which fail by reason of Due Process requirements and eminent domain takings which require just compensation. The Court of Appeals clearly said that it was not making rules for just compensation cases. Appellants' distortion of the holding of the Court of Appeals into an alleged "rule" concerning just compensation is apparently based on their desire to avoid the consequences of their failure of proof on the Due Process issue.

affirmed the order of the Appellate Division, finding that appellants had not been deprived of their property without due process. Contrasting the record before it with another case involving the Landmarks Law and a charitable property, it stated:

"there has been no showing that the property, owned not by a charitable enterprise but by an entity existing to make a profit, is incapable in its economic context of producing a reasonable return, even if its development is limited." (JSA 10a-11a)

Appellants' proof on the crucial issue now before this Court had failed.

In its opinion the Court of Appeals explored considerations additional to those relied on by the Appellate Division which it felt offered further ways to approach the difficult measurement

of degree and reasonableness which traditionally marked the boundary between permissible regulations and those which fail under Due Process standards. It did so for the first time confronting a statute which expressly called for an evaluation of the reasonableness of the return remaining available to an owner of a commercial property subject to preservation regulation. The property, Grand Central Terminal, is the magnificent physical centerpiece of a business enterprise of extraordinary complexity, the worth of which is extremely difficult to fix. Moreover the business enterprise is one which has over the years benefited from an extraordinary number of public financial supports -- ranging from city real estate tax abatements to the present lease arrangements whereby the

State of New York relieves appellants of losses from certain of their railroad operations -- supports which have been granted in recognition of the peculiar nature of the railroad as a necessary public service. Finally, and perhaps most significantly, the potential value to this business enterprise of the speculative office tower development proposed here is uniquely tied to the continued operation of the commuter railroads in the Terminal, an operation now completely dependent upon continued public subsidies.

Faced with these circumstances the Court of Appeals acknowledged the special quality of the case, as a matter of the particular building being regulated, of the statute which in this case regulates it and of the public service business

which owns and operates it. As it said, as much of this complex of issues as of the building itself, "Grand Central Terminal is no ordinary landmark." (JSA 7a)

In order properly to address the particular statute in question here, the Court of Appeals distinguished the purposes of the Landmarks Preservation Law from the purposes of zoning and other property regulations. It identified the Landmarks Preservation Law as a distinct public program with a purpose of its own, to regulate a separate kind of property having special public importance because of inherent cultural and historic values. Having thus recognized the differences between various kinds of property regulation, the Court held that all of them were subject to the same constitutional standard, namely, that such

regulation is proper so long as the owner is not deprived of "all reasonable return on his property." (JSA 1a)\*

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\* As the Court of Appeals said in a subsequent case:

"Although the regulation of billboards presents a somewhat different problem than those previously encountered in French and Penn Central [the decision appealed from herein], the analytical framework developed in those cases is useful in resolving whether a landowner who has erected billboards on his property is deprived of the use of his property by a regulation prohibiting the maintenance of such billboards. Drawing upon this analysis, we are of the opinion that, regardless of whether a legislative pronouncement is denominated a zoning ordinance, a landmark regulation, or more broadly, as an exercise of the police power, the critical test of its constitutionality remains whether the challenged legislation deprived a property owner of all reasonable use of his property. To be distinguished, however, are instances of the exercise of the governmental power of eminent domain in which there is a true "taking" of the property." Modjeska Sign Studios, Inc. v. Berle, \_\_ NY 2d \_\_ (December 21, 1977) (slip opinion 5-6).

For a regulatory scheme with this purpose, the Court suggested three additional considerations which might be taken into account when measuring the effect of the regulation on appellants' very special business. Here it noted that it would be proper in computing the return left to them on the regulated landmark to take account of the value to appellants of the transferable development rights -- something, as found by the Appellate Division, they had left out of their accounting. It noted also the importance of Grand Central Terminal as a "flagship," drawing business to appellants' other properties, contributing returns which, if hard to quantify, are clearly not negligible. And it suggested, in an effort to take account both of the public character of the services which is the base

of the business and of appellants' private enterprise which has, with all the public supports, provided the service itself, that it would be proper to limit the base against which the property owners' return should be measured to a base related to his own "investment" in the enterprise, leaving out of the calculation what it called the "social investment" for which he cannot take credit. Thus returning to the basic question of fairness underlying this and all other property regulation cases, the court proposed to remove from such computation values which, if they were included, would materially distort it.

In discussing these issues the Court never suggested that they

underlay or should be seen to underlie the decision which it unanimously affirmed.\* Rather, the Court of Appeals put these suggestions forward as additional considerations in support of the analysis made by the Appellate Division, but which would require for their actual application the development of facts not present in the record before it. On that record, the court said, "The result directed by the Appellate Division is correct."

(JSA 14a)

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\* Nor could they be seen to underlie it: for example, the "social investment" theory, requiring as it does a determination of the adequacy of a return when measured against an investment base from which social contributions are to be excluded, requires the prior determination of a fair statement of income and expense -- exactly the statement which the Appellate Division found appellants had not provided.

The Appellants' Argument

Appellants in this proceeding do not challenge the findings of fact affirmed by the Court of Appeals. Instead, to avoid the effect of their failure to prove, they now present an argument not advanced before the courts below, namely, that the "property" subject to the regulation is not the landmark building and the land on which it is located -- defined by the Landmarks Preservation Law as the "landmark site" or the "improvement parcel" -- but only the air space over it. Thus they subdivide their property so as to exclude the nub of the controversy settled by the Court's findings of fact below -- that they had failed to prove that the law unreasonably interferes with their use of the landmark. They then invite this Court to

embark with them on an unprecedented exploration of an extreme and extraordinary theory of law: that property regulations are invariably compensable "takings" to the extent of their diminution of the development potential of regulated land. This by their argument will always be true since the interest affected by a regulation can always be subdivided out as if it were a separate piece of property and then described, by their rationale, as having been "taken".

Appellants in fact dismiss as "immaterial" their failure of proof on the critical issue of return. (Appellants' Brief 8 Note 7). The failure of course becomes "immaterial" once one assumes with them the "taking" which they failed to prove. Furthermore, it can be seen as

"immaterial" only if one accepts appellants' premise that the Terminal's potential for speculative development can be evaluated in a vacuum without consideration of the return on the underlying land and building. By their argument, among other things, however handsome their return from the Terminal itself, they could always claim a taking of the air rights. Ultimately, their position, however clothed, is nothing more or less than a restatement of the rule - uniformly rejected by courts in property regulation cases - that landowners are constitutionally entitled to the highest and best use of their land.

Appellants also ignore the findings of both courts below that the

very same property interest they say has been "taken" -- that is, the potential of the Terminal for speculative office development -- has in fact not been wholly taken away from them and remains available to them, in substantial part at least, through the transfer of the development potential to nearby sites owned by Penn Central.

Appellants make their assumption of this "taking" in the course of a seriously misleading presentation of the decision of the Court of Appeals. Thus they assert the Court of Appeals to have held that landmarks, because they are landmarks, may be condemned without just compensation. (Appellants' Brief 12) This assertion is, among other things, nonsense. As has been noted, the Court

of Appeals carefully distinguished (as the Constitution requires) the Due Process problem before it from what would be appropriate in a condemnation case. In reducing the decision of the Court of Appeals to a rationalization of special statutory ill-treatment of landmark owners, appellants completely ignore what the Court of Appeals actually held. The issue addressed by the Court of Appeals was whether the application of the Landmarks Law was a proper exercise of the police power and did not deprive them of all reasonable use of their property. This is the central issue in this case and cannot simply be assumed away.

Disastrous consequences would follow if appellants' assumption of a "taking" here were accepted by this Court:

every single property regulation undertaken for any purpose whatsoever would carry with it a requirement that every single private property interest affected by the regulation be paid for by the regulating municipality -- and paid for on the basis of the highest speculative value that could possibly be assigned to it. If this were the case, as Mr. Justice Holmes said many years ago, "Government could hardly go on." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 413 (1922). The attraction of this extreme position to appellants is obvious, but, as the argument will show, it is far from being the law of this land.

Summary of Argument

Property regulations for the purpose of preserving buildings of special historic, cultural or aesthetic importance constitute a proper exercise of the police powers and as such have been upheld in their application to individual properties so long as the regulations as applied do not deprive the landowner of all reasonable beneficial use of the property. This is true whether the landmark buildings are located in historic districts or identified throughout a city as a whole.

A party challenging the constitutionality of the regulation has the burden of showing that the regulation deprives him of all reasonable beneficial use of his property. The

finding of the courts below that appellants had not met this burden is essentially unchallenged and is clearly reasonable. The appellants' failure, among other things, to include in their proof regarding their return from the Terminal, any rental value for the vast space in the Terminal devoted to railroad purposes and the return which would have been available through transfer of development rights to nearby properties clearly made it impossible to determine the quantum of return - and accordingly any measurement of its reasonableness. This fundamental failure precludes any finding that the regulation as applied was unreasonable entirely apart from the additional considerations, such as the "social-investment" concept, cited by the Court of Appeals.

Appellants attempt to avoid the effect of this failure of proof by subdividing the property so as to treat the air rights as a property separate and distinct from the underlying Terminal. There is no support in reason or authority for this arbitrary and artificial subdivision which, if approved, would have catastrophic effects on all property regulation. The property which is regulated is the Terminal property as a whole and the fairness of the regulation must therefore be considered in the light of the return to its owner from the Terminal property as a whole.

The eminent domain cases cited by appellants which involve invasions of air space above a landowner's property

are irrelevant since they are based on physical intrusions into the owner's property in circumstances where there was no claim that the intrusion was justified as a proper exercise of the police power.

Argument

I THE LANDMARKS PRESERVATION  
LAW IS A REGULATORY SCHEME  
UNDERTAKEN FOR A PROPER  
PUBLIC PURPOSE

New York City's Landmarks

Preservation Law was enacted in 1965, pursuant to New York State enabling legislation adopted in 1956 which declared preservation of landmark values to be the public policy of the State. N.Y. Sess. Laws, ch. 216 (McKinney 1956) repealed, amended and reenacted as N.Y. Gen. Munic. Law § 96-9 (McKinney Supp. 1974-75). The Landmarks Law provided a comprehensive scheme for the identification and protection of all the buildings and other features of special historic, cultural, aesthetic and other importance throughout the City which give the City its special character as a place to live,

work and visit. The City Council acknowledged in its enactment of the Law the importance to the "health, prosperity, safety and welfare" of the people of New York of the preservation of these buildings, paying particular attention to the cultural and economic harm which would follow if they were unnecessarily destroyed (JSA 76a).

In imposing protective regulations to protect these public values, New York City joined the nationwide -- indeed worldwide\* -- movement for the protection of values of built

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\* In Great Britain comprehensive landmark preservation regulation is provided for in the Town and Country Planning Act, 1971, c. 78, Part IV; similarly France provided for such regulation in the Law of Dec. 31, 1913, Concerning Historic Monuments, 33 *Annuaire de Legislation Francaise* 219 (1913). Under

environments in cities which are crucial to their identity and continued vitality. In this effort, the City was careful to provide standards for relief which were intended to accord with basic Constitutional due process standards (Section 207-8.0, JSA 94a) and in no case has the validity of the New York law on its face been substantially challenged.

Regulatory schemes to protect

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(Footnote continued from previous page)

the English statute where a property owner claims that with the designation of his building "the land cannot be rendered capable of reasonably beneficial use", that statute expressly stipulates that in determining whether a reasonable use survives, "no account shall be taken of any prospective use of that land which would involve the carrying out of new development". Town and Country Planning Act 1971, c. 78, s. 190(2).

public interests in the built environment are now legion.\* Such schemes have frequently been upheld as proper exercises of the police power, among those upheld being many intended to protect values like those protected by the Landmarks Preservation Law. Berman v. Parker, 348 U.S. 26 (1954); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) cert. den. 426 U.S. 905 (1976) City of New Orleans v. Dukes 427 U.S. 297 (1976). In cases such as these, legislative schemes to protect these values have been approved with express recognition that those values are as worthy objects of legislative action as

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\* J. Morrison, Historic Preservation Law (1965) (Supp. 1972).

any other public interests, being entitled to the same degree of police power protection as any other such objects.

Appellants make "no claim" that the preservation of buildings of historical or aesthetic importance is an impermissible objective of governmental action in pursuit of the public welfare (Appellants' Brief 12)\*. Appellants appear to suggest (Appellants'

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\* As indeed they could not in the face of the many cases upholding landmarks preservation regulations. Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La., 1974), affd. 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976); Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 AD 2d 376, 288 N.Y.S. 2d 314 (1st Dept., 1968); First Presbyterian Church of York v. City Council of the City of York, 25 Pa.C. 154, 360 A. 2d 257 (Commonwealth Ct. of Pa., 1976); Figarsky v. Historic District Commission of the City of Norwich, 171 Conn. 198, 368 A. 2d 163 (1976); Lafayette Park Baptist Church v. Scott, 553 S.W. 2d 856 (Mo. Ct. of App., 1977); Rebman v. City of Springfield,

Brief 22-23) that the power to protect landmarks extends only to landmarks located within historic districts. They do so by suggesting that the sole basis for upholding zoning restrictions and historic district restrictions is a supposed mutuality of benefit and burden to landowners within the particular area affected. Apart from the fact that such "mutuality" is more

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(Footnote continued from previous page)

111 Ill App. 2d 430, 250 N.E. 2d 282 (1969); Opinion of the Justices to the Senate, 333 Mass. 773, 783, 128 N.E. 2d 557, 564 (1955); City of Santa Fe v. Gamble-Skogmo Inc., 73 N.M. 410, 389 P. 2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A. 2d 232 (1964). See also City of St. Paul v. Chicago, St. P., M.&O. Ry. Co., 413 F. 2d 762 (8th Cir., 1969), cert. den. 396 U.S. 985 (1969); Benenson v. United States, 548 F. 2d 939, 949 (Ct. Cl., 1977).

supposed than real - the argument avoids the determinative issue, which is whether the classification of buildings of landmark quality within a city as a whole "bears 'a rational relationship to a [permissible] state objective'". Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). The Court of Appeals held that the classification of individual landmarks here involved did bear such a rational relationship, stating:

"Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel." (JSA 6a)

Appellants do not, and indeed cannot,

challenge this finding.

Given this conceded propriety of objective, given the generality of interest expressed by federal, state and local legislatures in the protection of these values and given the general presumption of validity to be accorded to legislative schemes for public objectives generally recognized to be proper, the New York appellate courts clearly cannot be said to have been in error when they generally approved the Landmarks Preservation Law as legislation in support of which the full strength of the police power could be brought to bear. The question remains, then, whether they nevertheless erred when they found that the exercise of that power under the law, when examined

in its particular application to appellants' property, still did not offend against constitutional due process standards.

II. REGULATORY SCHEMES LIKE THE  
LANDMARKS PRESERVATION LAW  
ARE PROPER IN THEIR APPLI-  
CATION SO LONG AS THEY DO  
NOT UNREASONABLY RESTRICT  
THE USE OF THE REGULATED  
PROPERTY

The determination whether a property regulation proper in its purposes and otherwise valid on its face is nevertheless invalid as unconstitutional in its application has generally been formulated by this Court as a question of degree. Perhaps the classic recognition of this principle came in Pennsylvania Coal Co. v. Mahon in Mr. Justice Holmes' statement: "The

general rule at least is that while property may be regulated to a certain extent, if legislation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). That the question is a matter of degree has been frequently reaffirmed, the difficulty remaining in each case to determine how far is too far. As this Court has stated:

"There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sebastian, supra, where a diminution in value from \$800,000 to \$60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, infra, p. 596, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an

unconstitutional taking if it is otherwise a valid police regulation. (Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

The question has remained a matter of reasonableness in the particular case, as the underlying concepts of fairness and due process perhaps make inevitable.

The "social investment" concept discussed by the Court of Appeals finds its relevance as a consideration which can be properly viewed in applying these broad constitutional requirements of fairness and reasonableness. Since, as noted infra, footnote at 20, the record as developed at the trial of this matter did not permit a concrete application of the concept, it is submitted that its constitutional validity need not, and

perhaps should not, be determined at this time.

A. The New York Appellate Courts Properly Approached the Question Presented as a Matter of Degree and Their Rulings With Respect to Appellants' Failure of Proof Were Not Unreasonable

Facing the question of the validity of an application of the Landmarks Law, the New York appellate courts approached the problem as a question of degree and reasonableness and did not err in so doing. In their experience with determinations of this sort under a variety of property regulations, the New York courts have invariably started with an effort to evaluate and measure the degree of hardship, working towards the formulation of an objective standard for how far is too far. See e.g., Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493

121 N.E. 2d 517 (1954); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587 (1938). In cases specifically involving the Landmarks Preservation Law, the New York courts have made the same effort to measure the reasonableness of the hardship to the particular owner. Lutheran Church in Amer. v. City of New York, 35 N.Y. 2d 121, 316 N.E. 2d 305 (1974), Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D. 376, 288 N.Y.S. 2d 314 (1st Dept. 1968). In the instant case they again undertook to measure it against appellants' particular situation. The Appellate Division found that the appellants had failed to show what return the Terminal, as regulated was capable of yielding to its owner. The Court of Appeals

affirmed, suggesting considerations which would also support the result reached. What was fundamental to both courts' analyses was the search for the limits of fairness in the particular case, as required by the rulings of this Court.

This Court has always held that the party complaining of the regulation has the burden of proving that the particular regulation goes too far. Goldblatt v. Hempstead, 369 U.S. 590, 595-96 (1962); Maher v. City of New Orleans, 516 F.2d 1051, 1067 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). The New York appellate courts likewise placed on appellants the burden of proof and, in so doing, cannot be

seen to have erred. Nor when they imposed that burden did they erect unreasonable standards of proof for appellants to meet.

A review of the judgment of the lower courts, and the enumeration on which it is based, shows it to be not unreasonable and far from arbitrary. Appellants' failure to take any account of any rental value for the use of "the vast space in the Terminal devoted to railroad purposes" (JSA 25a) goes to the heart of the case on the Terminal's economic value as a building. To insulate the calculation from the caprices and incompetence of particular owners, the court phrased the question as whether

the Terminal as regulated was "incapable" of earning its owners a reasonable return, not whether it was actually earning them one. As to that question, a computation which omits the rental value of the building is clearly incompetent as a matter of proof. This was not the only omission pointed out by the court, and the sum of them clearly supports the court's determination that appellants' burden of proof has not been met.

B. Interpreted as an Argument with Respect to the Crucial Issue of the Degree of Hardship, Appellants' Argument to this Court is Without Any Support in Authority and Offers no Reason to Reopen and Reverse the Determinations of the New York Appellate Courts

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Appellants do not attack the decisions below on any of the grounds critical to the determination here -- which might alone be enough to require this Court to dismiss their appeal.\*

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\* This Court dismissed certiorari as improvidently granted in a case also from the New York Court of Appeals, after oral argument before the Supreme Court, explaining that:

"[i]t is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for deci-

(Cont'd on following page)

Rather, they simply ask this Court to assume with them that their

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(Cont'd from previous page)

sion to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

[citations omitted] Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Emphasis supplied.) Lynch v. New York, 293 U.S. 52, 54-55 (1934).

This Court's prohibition against ruling upon hypothetical questions not necessarily raised in a record before it, constitutes a jurisdictional bar to this Court's determination of issues considered by the New York Court of Appeals but not necessary to the result reached.

(Cont'd on following page)

property has been taken because they have been prevented by the law from proceeding with one particular

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"The Supreme Court's appellate jurisdiction over state court judgments is limited to review of federal questions necessary to the decision of the highest state court in which a decision could be had. Although commentators have differed as to the basis of the requirement that a question, to be reviewable, must have been necessary to the decision, the Court has indicated that it derives from the general prohibition against the rendering of advisory opinions and has applied it as a rigid jurisdictional restriction.

"Consequently, even if a federal question has been decided, Supreme Court review is barred if the state court's disposition was also based on a nonfederal ground that is, in the Court's view, independent of federal issues before the Court and adequate in itself to support the judgment." [footnotes omitted]. Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 Colum.L.Rev. 822, 822 (1962).

development plan. Then they ask it to go on without argument to their further claim for compensation for this taking.

This conclusory allegation, if treated for the moment as an argument, can be regarded as an assertion concerning the question of degree of hardship: that their property has been excessively restricted by this regulation. But even viewed as an argument, the assertion is extraordinarily distorted by what it omits. First, it takes no account of the degree to which the development potential they seek to exploit, was and still is available to them on other sites, because of the development rights transfer arrangements made for them by the City. And, second -- and

most important -- it takes no account whatever of the return available to them from the Terminal in its regulated form.

This latter omission is the result of the subdivision they make of the property, asking this Court to evaluate this regulation not as it restricts the property which is the subject of the regulation that is, the Terminal, the underlying land and the rights appertaining thereto taken as a whole -- but as it applies to only a portion of the property the air space above it, as arbitrarily separated out by them. This subdivision is truly remarkable, flying as it does in the face of the legislative intent and omitting as it would the whole essence of the

conflict, namely, the evaluation of the remaining use of the regulated property, Grand Central Terminal. No authority whatever exists for an approach to regulation which would treat each interest in a property as a separate parcel, to be protected without regard to its relationship to the whole. The result of such an approach would of course be catastrophic, with even the mildest property regulation rendered absolutely prohibitive in cost.

At best, appellants' approach, treated still as if it were offered as a relevant argument, seems an ingenious effort to make a case for the constitutional protection of the highest and best use -- since what they assert is denied them is (at least from their point of view) the "highest

and best use" permitted by the zoning. However ingenious, the argument still does not create authority for a proposition which has not been held to have merit for many years. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 592 (1962) The question remains the more difficult matter of degree -- how much restriction beyond the elimination of the highest and best use will still be permissible -- and appellants, by any interpretation of their argument, simply do not address it.

The eminent domain cases cited by appellants, such as Griggs v. Allegheny County, 369 U.S. 84 (1962) and United States v. Causby, 328 U.S. 256 (1946) are simply irrelevant. These cases all of which started from formal exercises of the power of

eminent domain in connection with public works, held only that physical intrusions into the air space above the landowner's property which prevent normal usage of the property constitute a compensable taking to the same extent as if land had been taken for use as runways. In these cases, it was assumed that compensation was payable if there was sufficient impact on the landowner. In the instant case, as in all cases of land use regulation for a proper police power objective, the issue is not whether there is an economic impact on the landowner but rather whether such impact is so great as to leave the landowner with no reasonable beneficial use of his property.

III. APPELLANTS ARE ENTITLED  
NEITHER TO COMPENSATION  
NOR TO DAMAGES EVEN IF  
THE LANDMARKS LAW AS  
APPLIED IS INVALID

There is no question that the City of New York, in enacting the Landmarks Preservation Law and applying it to Grand Central Terminal, acted in a good faith belief that it was properly exercising its police powers for a proper public purpose. If this Court were to hold -- as we respectfully submit it should not -- that this application of the Law is not a permissible exercise of the City's police powers it does not follow, as appellants contend, that appellants are entitled to compensation or damages. Velting v. Ramsey, 94 N.J.Sup. 459, 228 A.2d 873 (1967); French Inv. Co. v. City of New York, 39 N.Y.2d 587,

350 N.E.2d 381 (1976), app. dismiss.,  
429 U.S. 990 (1976). (See also other  
cases cited in Point II of the Brief  
of the City of New York.)

To permit such a claim,  
would place governmental bodies at  
immense financial risk whenever they  
in good faith undertook any property  
regulation, the constitutionality of  
which could be questioned. The de-  
velopment of new laws to protect  
emerging public interests would, as  
a practical matter, be impossible.

CONCLUSION

On the basis of the forego-  
ing and particularly given that the  
factual question central to the de-  
cisions below -- namely, appellants'  
failure to meet their burden of  
proof -- remains unchallenged any-  
where here, it is clearly appropriate  
that appellants' appeal now be dis-  
missed on grounds that probable  
jurisdiction does not exist. The  
Monrosa v. Carbon Black, Inc., 359  
U.S. 180, 184 (1959). None of the  
issues raised here by appellants need  
be addressed, given the unchallenged  
factual determination central to the  
decisions brought here on appeal, and  
none of them should be. Rice v.

Sioux City Cemetery, 349 U.S. 70

(1955).\*

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\* As this Court said in that case:

"[t]here is nothing unique about such dismissal even after full argument. There have been more than sixty such cases and on occasion full opinions have accompanied the dismissal. [citations omitted] The circumstances of this case may be different and more unusual. But this impressive practice proves that the Court has not hesitated to dismiss a writ even at this advanced stage where it appears on further deliberation, induced by new considerations, that the case is not appropriate for adjudication." Rice v. Sioux City Cemetery, 349 U.S. 70, 77-79 (1955). And, see footnote 47-48, infra.

Absent such dismissal, this Court should in any case affirm the decisions of the Courts below as being in accord with traditional analyses upholding applications of police power regulations. If it is unwilling to do so, this Court should then remand this proceeding to the Court of Appeals with an appropriate instruction that it reconsider and more clearly articulate in light of traditional analyses the grounds for its decision.

Respectfully submitted,

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The Interests of Amici Curiae

The Municipal Art Society of  
New York

The Municipal Art Society of New York has since 1892 dedicated itself to the preservation and improvement of the quality of art and architecture in New York City as a vital aspect of the quality of life itself here. Together with other civic and professional groups, including several of those who join in this brief, the Society initiated and sponsored the study of ways and means to preserve important historic architecture which led to the enactment of the Landmarks Law. The Society considers that the desecration or demolition of Grand Central Terminal in accordance with the owners' plans will do irreparable

harm to the architectural heritage of the City and deprive the people of New York of the extensive public benefits which derive from the continued presence of the Terminal in its present form. It believes that these interests may be protected by enforcement of the Landmarks Law without imposing an undue burden.

The New York Chapter of the American Institute of Architects

The New York Chapter of the American Institute of Architects, established in 1867, is a professional organization of architects in New York County and certain upstate counties. By tradition it has been active in urban planning affairs throughout New York City. Through its Committee on

Historic Buildings it has frequently expressed its opinion on questions concerning application of the Landmarks Law. The New York Chapter of the American Institute of Architects, joins this brief because of the challenge to the validity of landmark preservation laws and because of the threat of demolition of part of New York's heritage, the landmark Grand Central Station.

The Architectural League of New York

Founded in 1881, the Architectural League of New York is a non-profit membership organization sponsoring exhibitions, research projects, lecture series, tours and other cultural events which explore innovative ideas in architecture and the

related art and design fields.

Seeking to provide a forum for the exploration of important issues, the Architectural League sponsors conferences on timely subjects such as: neighborhood preservation with Ralph Nader as keynote speaker, an undergraduate architectural education in a liberal arts college.

In response to interest among its members, the Architectural League also sponsors: The Committee for the Preservation of Architectural Records, and the Archives of Women in Architecture.

#### The Brooklyn Heights Association

The Brooklyn Heights Association, formed in 1910, is the oldest, largest and one of the most effective

community organizations in the City of New York. The Association was instrumental in the passage of the Landmarks Law and was responsible for Brooklyn Heights' designation as a National Historic Site by the Federal Government in 1964 and as the first Historic District by the Landmarks Preservation Commission in 1965. The Association is committed to the effective implementation and enforcement of the Landmarks Law and it works diligently, in cooperation with the Commission, to achieve such ends.

The unique quality of life in Brooklyn Heights is based in large part on the preservation of the many brownstone homes and other unique buildings which exist in the area. The

preservation of Brooklyn Heights as a unique area of the City is and will continue to be dependent on the existence of the Landmarks Law as an effective instrument to preserve and protect structures in the City such as Grand Central Terminal. The Brooklyn Heights Association firmly believes that the fate of the quality of life in Brooklyn Heights, and in the rest of the City, will be dependent on the fate of the Landmarks Law and Grand Central Terminal.

Citizens Housing and Planning Council

Citizens Housing and Planning Council is a non-partisan citizens' organization which since 1937 has promoted vigorous public and private action for improved city-wide planning,

neighborhood conservation, and better housing conditions, especially for low and moderate income families. CHPC has been especially concerned with the management and use of New York City land and resources. This interest has prompted the organization to assume an active role in issues involving such planning techniques as zoning, landmark preservation and environmental regulation. Citizens Housing and Planning Council membership represents a wide range of interests -- professionals in the fields of housing and planning; social welfare and labor leaders; architects, builders and realtors, civic leaders as well as citizens who are interested in the major planning and development decisions facing New York.

The Citizens Union of the City of New York

The Citizens Union of the City of New York is a non-partisan organization of citizens devoted to improvement of New York's state and local government. Since 1897, it has worked to make New York City a better place for working and living. Through a series of committees, Citizens Union makes recommendations on important issues of public concern. Citizens Union was a leader in the efforts that resulted in the establishment of the Landmarks Preservation Commission and has often served as a civic "watchdog" on landmarks preservation and related issues.

The City Club of New York, Inc.

The City Club of New York, Inc. is a non-partisan, independent organization dedicated to securing permanent good government for the City of New York. Its interest in promoting environmental quality in this City is evidenced in part by its institution of The Bard Awards as an annual program to honor and encourage excellence in architecture and design which includes the preservation and remodeling of existing structures.

The Fine Arts Federation of New York

The Fine Arts Federation of New York was formed to "ensure united action by the Art Societies of New York in all matters affecting their common

interests, and to foster and protect the artistic interests of the community." The Federation is concerned with increasing the use of art in public buildings, administering competitions to ensure its excellence, with safeguarding the interests in artists, protecting and enhancing the city's parks and other open spaces, pressing for beautification of and access to the waterfront, with maintaining a rich architectural mix in our neighborhoods and on our streets, and with preserving significant and beloved buildings erected by earlier generations. The Federation believes that the preservation of Grand Central Terminal has the utmost importance to the City of New York.

### The New York Landmarks Conservancy

The New York Landmarks Conservancy is a not-for-profit, tax-exempt organization dedicated to the protection, preservation and continuing use of architecturally, historically or culturally significant buildings in the State of New York and, particularly, in the City of New York. Incorporated in 1973 by a group of preservationists, architects, planners and lawyers, the Conservancy has engaged in a number of studies of important buildings to provide for these structures new and economically feasible uses. The Conservancy aggressively supports responsible preservation efforts and is keenly interested in affirming the Landmarks Law as a means of ensuring,

for posterity, the rich architectural diversity that is the heritage of New York City.

The Preservation League of New York State

The Preservation League of New York State was established in March, 1974 for the purpose, among others, of instilling in the citizens of New York State an appreciation of the educational, historical, architectural and aesthetic significance of their environmental heritage. It is joining in this brief because it believes strongly that Grand Central Station is one of the most distinguished architectural structures of its period and that it adds greatly to the aesthetic and cultural heritage of New

York City. Its destruction would be an inestimable loss.

The Women's City Club of New York, Inc.

The Women's City Club is a civic, educational organization which has been in existence for 60 years and has a membership of 1,000 women, many of whom are top professionals in and out of government. Its purpose is to make New York City a better governed and better city in which to live and work and visit.

The establishment of the Landmarks Commission was a significant step in the attainment of the Club's goals. The Women's City Club has joined as amicus curiae the effort to sustain the decision of the Court of Appeals in the Grand Central Terminal case be-

cause it believes the whole concept of landmark preservation to be at stake.

Preservation Action

Preservation Action is a national organization devoted to the advancement of appropriate legislation for the protection of the historic, cultural, aesthetic and other values inherent in the built Environment.

Preservation Action believes that the outcome of this proceeding will determine for some time to come whether regulation programs to protect those values will be permitted and whether, accordingly it will be possible for government throughout the United States to devise practicable schemes to save our national heritage.

Preservation Action is participating

in this Brief amicus to support the City of New York.

National Center for Preservation Law

The National Center for Preservation Law is a not-for-profit corporation devoted to the understanding and advancement of the range of legal issues inherent in efforts to save the man-made environment. The National Center believes that this case will dispose of one of the issues central to this effort in a way which will be crucial to the future development of the law of preservation. It lends its support to the City of New York because it believes the Landmarks Preservation Law is a responsible regulation, to preserve landmark values, which is constitutional.

The Forty-Second Street Re-  
development Corporation

The Forty-Second Street Re-development Corporation is a not-for-profit tax exempt Local Development Corporation mandated by state law to renew the westerly blocks on 42nd Street (8th to 12th Ave.); to upgrade the middle blocks (6th to 8th Avenues); and to then link a strengthened West end to the strong Easterly end of 42nd Street -- creating, in time, a river to river grand boulevard which would become a major source of badly needed revenues and jobs for the City. The corporation was formed in February 1976. Grand Central Terminal is one of the principal visitor attaching on those easterly blocks, and its survival is crucial to the corporation's long range objectives.

The American Institute of Architects

The American Institute of Architects is a national voluntary professional association of 26,000 registered architects in 250 chapters. Established in 1857 as a membership corporation under the laws of the State of New York, A.I.A. is a dynamic force speaking for the entire architectural profession. Through more than one hundred years of activity dedicated to the public interest, the Institute has spoken out and worked for the preservation and active use of America's historic and architectural heritage.

Therefore, the A.I.A., as directed by a resolution voted by its membership in convention, joins

this brief, in support of the validity of landmark preservation laws on the basis of the police power, rather than the power of eminent domain.

MAR 6 1978

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY  
CORPORATION, UGP PROPERTIES, INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

On Appeal from the Court of Appeals  
of the State of New York

**BRIEF OF THE STATE OF NEW YORK,  
AMICUS CURIAE**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

Docket No. 77-444

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PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK  
AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY  
CORPORATION, UGP PROPERTIES, INC.,

*Appellants,*

v.

THE CITY OF NEW YORK, et al.,

*Appellees.*

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On Appeal from the Court of Appeals  
of the State of New York

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**BRIEF OF THE STATE OF NEW YORK,  
*AMICUS CURIAE***

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**Interest of the *Amicus***

This brief is submitted by the State of New York in support of affirmance of the order of the New York Court of Appeals in this litigation of profound significance to the State of New York and the distinctiveness and heritage of its major city.

The protection of the architectural integrity of New York's world-famous Grand Central Terminal as a landmark for the use, education, and inspiration of the inhabitants of New York City and its many thousands of

daily business, vacationing and other visitors is a concern vital to the interest of the State, as is New York's interest in upholding the constitutionality of the New York City Landmarks Preservation Law.

Indeed, the State empowered the City to enact such legislation in an enabling act, General Municipal Law § 96-a, which specifically authorizes the City to protect and enhance buildings "having a special character or special historical or aesthetic interest or value." New York City's farsighted landmarks preservation legislation is an important and valid exercise of the police power, emulated by numerous other municipalities in New York and throughout the nation. The loss or crippling of this legislation would be devastating to the quality of life in this metropolis and cultural, artistic and commercial center—a loss far transcending the architectural debasement and inevitable coarsening of the terminal and surrounding area which would also result.

New York City has witnessed the demise over the years of many splendid buildings which were examples of great artistic and architectural design, such as the original McKim, Mead and White Pennsylvania Station—blows to the vitality and uniqueness of the City which led to the enactment of the very landmark law here under attack. There has since been developing, in New York and in many other cities as well, a keen public awareness of the importance and significance of these edifices, not only architecturally and historically but in terms of the sheer identity of the City and the perception of it as a separate entity different from any other. The economic consequences alone—all else aside—of the loss of this attraction would be devastating to New York City's magnetism as a tourist, commercial and artistic hub. Unfortunately, once destroyed, historic landmarks can never be replaced—only reproduced artificially, such as has been done at Williamsburg and Sturbridge Village, at astronomical expense.

A great city's identity is inextricably interwoven with its landmarks. Rome is famous for its Colosseum, London for the Houses of Parliament and St. Paul's, New Orleans for its French Quarter, an entire district legally protected from ravaging in the name of "development." See *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. den. 426 U.S. 905, discussed *infra*. Charleston, Richmond, Savannah and other cities rich in architectural heritage have taken similar steps to protect this asset—steps which the ratification of the radical views of the plaintiffs would endanger.

New York's rich history is reflective of the enormous amount of time, money and talent invested in building up its unique architectural heritage. The Brooklyn Bridge, the New York brownstone, the Metropolitan Museum of Art, the Public Library and Grand Central Terminal are each important and irreplaceable components of the special uniqueness of New York City. Stripped of these historic structures, New York would be indistinguishable from numerous other cities whose steel-and-glass skylines today are as ubiquitous as their fast-food establishments. A nation devoid of architectural individuality is a land deprived of uniqueness and of the consciousness of heritage which engenders pride in one's surroundings—a land whose inhabitants, like Frost's hired man, would have "nothing to look backward on with pride, nothing to look forward to with hope."

A traveler arriving at Grand Central Terminal, or approaching it from the City's nearby streets, encounters one of New York's greatest attractions—a dramatic building which functions more efficiently than most modern railroad terminals in America. The importance of preserving this great station is not only cultural and historical but economic as well since it constitutes a major tourist attraction, beckoning innumerable visitors into the heart of the metropolis, contributing to the City's economy in innumer-

able ways. Grand Central, owned by a government supported corporation, is a terminal for hundreds of trains each day which are operated with federal, state and Metropolitan Transportation Authority funds.\* It is truly a public building in every meaningful sense. As stewards of this vital structure, the officers of the Penn Central have no more constitutional power to destroy or deface it in contravention of the City's determination that it is a landmark than they would to tear up its tracks.

Historic landmark preservation is gaining momentum throughout the United States. Laws designed to preserve historically and culturally valuable structures have been enacted in some ninety jurisdictions and upheld in all states where the matter has been tested in court. See, *e.g.*, *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 557 (1955); *Matter of Sailors' Snug Harbor v. Platt*, 29 A D 2d 376, 288 N.Y.S. 2d 314 (1st Dept. 1968); *Maher v. City of New Orleans*, *supra*, 516 F.2d 1051. Without legislation of the sort here under attack the bulldozer would deprive our cities of individuality in short order.

Appellants' assault here is not merely on the City's designation of Grand Central Terminal as a landmark—a determination fully warranted by the facts and unassailable here. They are in fact striking a blow at the City's landmarks law and the State's basic police power as it applies to zoning and the use of land. For if appellants' broad definition of what constitutes a taking is adopted, land-use restrictions of all kinds are in jeopardy wherever

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\* Federal recognition of the need to preserve terminals such as Grand Central was expressed in the 1974 Amtrak Improvement Act, 49 USC § 1653(i)(7), as noted by the state court in this case, which directs Amtrak to "give preference to using station facilities that would preserve buildings of historical and architectural significance." The irony which would result from allowing the ravaging of Grand Central in the face of this statute needs no underscoring here.

they result in a mere diminution of value of the property regulated, and however much the public is entitled to protection from the destruction of its heritage.

The State of New York is vitally concerned in this. Not only does the City constitute New York's metropolis and a magnet for hundreds of thousands of tourists and business visitors, but the effectiveness of State legislation, as well as laws in other cities, to protect landmarks would be weakened by adoption of the retrogressive views advanced by appellants. Legislation has been introduced to furnish New York State with landmark preservation authority along lines generally comparable to that of the City to provide needed protection for irreplaceable structures throughout New York.

Congress has also recognized the importance of safeguarding historic landmarks, so that appellants' attempt to overturn the city ordinance runs directly counter to the Congressional intent expressed in the National Historic Preservation Act of 1966, 16 U.S.C. § 470 ("to assist State and local governments . . . to expand and accelerate their historic preservation programs"); the National Environmental Policy Act, 42 U.S.C. § 4321 (enunciating a national policy to preserve "important historic . . . aspects of our national heritage"); and with precise relevance here, the Amtrak Improvement Act of 1974, 49 U.S.C. § 1653 (i)(7), *supra*, directing Amtrak to "give preference to using station facilities that would preserve buildings of historical and architectural significance."

It is accepted now that the environment consists not merely of trees and watercourses but includes the quality of urban life as well. As Winston Churchill expressed it, in rejecting a now-unthinkable 1943 plan to replace the Houses of Parliament with a modern structure, "We shape our buildings, and afterwards our buildings shape us." *Onwards to Victory* (1944), pp. 316-318.

Rene Dubos in *So Human an Animal* (pp. 193-194) quotes the words of Lewis Mumford, peculiarly applicable here:

"If man had originally inhabited a world as blankly uniform as a 'high-rise' housing development, as featureless as a parking lot, as destitute of life as an automated factory, it is doubtful that he would have had a sufficiently varied experience to retain images, mold language, or acquire ideas."

As Dubos himself notes, *id.* at 198:

"As to our cities, no planning will save them from meaningless disorder leading to biological decay, unless man learns once more to use cities not only for the sake of business, but also for creating and experiencing in them the spirit of civilization."

The legislation which appellants here seek to undermine represents a large step in the direction of retaining that human spirit of which Dubos speaks. To sweep this statute aside would serve to stifle that movement among our cities and states to preserve the fabric of urban life, just when its importance has come to be broadly recognized.

### **Grand Central Terminal and its Landmark Designation**

The Landmarks Preservation Commission, in announcing the designation of Grand Central Terminal as a landmark on August 2, 1967, described it as "a magnificent example of French Beaux Arts architecture [and] one of the great buildings of America." It found the building to be a "skillful combination of architectural elements," creating "a building overpowering in its timeless grandeur"

(J.S.A. 20a-21a).<sup>\*</sup> Significantly, although appellants now see fit to describe the designation as having been made "over the objection of the Penn Central" (Br. p. 4), they did not challenge it until a year later.

Grand Central has been a railroad terminal since 1871. The present building was the result of a 1903 comprehensive plan of Penn Central's predecessor, the New York Central Railroad, which proved to be so farsighted in solving the logistic problems facing the railroad in New York City that today, nearly three-quarters of a century later, the Terminal remains one of the best functioning such facilities in the country. Besides providing for effective traffic flow, the structure was envisioned to be, and still is, an impressive point of arrival and departure for passengers in the heart of New York City, with its main concourse measuring 120 by 375 feet with a vault 125 feet high at its apex. This vault is "one of the noblest in America—surpassed only by the great glass and metal vaults of now-vanished Pennsylvania Station," as described by the New York State Office of Parks and Recreation, Division for Historic Preservation, in *Grand Central Terminal and Rockefeller Center, A Historic Critical Estimate of their Significance*, 5. The Terminal, particularly its Concourse, was designed to provide the passenger with a total sensory experience (*id.*):

"With the great sonorous echoes of the train announcers—so exciting for travellers to hear and so difficult for them to understand—this Concourse became the very symbol of the excitement of travel for generations of Americans."

So significant was the creation of Grand Central Terminal for urban and architectural ideas that even before its opening it was hailed as "the greatest railway terminal in the world." Robert A. Pope, "Grand Central Terminal Station," *The Town-Planning Review*, Univ. of Liverpool, II (April, 1911), 59.

<sup>\*</sup> References are to Joint Appendix.

Today, despite years of downgrading and neglect by appellant Penn Central and its predecessors, Grand Central remains a splendid edifice and a major part of the cultural and architectural heritage of the City of New York. Grand Central still maintains its original splendor, especially from the southern view, looking up Park Avenue—the very approach which the proposal at bar would damage. Although the Terminal has succeeded in absorbing the large increase in the amount of people moving through its concourse to the offices of the Pan American building, erected in 1958, further illustrating its well planned and farsighted design, it is difficult to envisage the Terminal successfully coping with yet another massive office building on its back.

The present attack on the Terminal was mounted on June 20, 1968, with two proposals to build a 54-story tower directly over the Terminal's waiting room—the subject of the present litigation. The proposed office space is intended for rental, not for the Penn Central's own use. This plan which, as amended by its proposers, would require destruction of the monumental 42nd Street facade of the Terminal, was quite properly rejected by the Commission. The City, however, allowed the Penn Central to transfer its development rights to its contiguous property containing the Biltmore Hotel. Although this alternative was consistent with the preservation of the Terminal and allowed appellants to build the desired office space on another valuable piece of adjacent commercial property, the railroad and realty corporations refused to implement this proposal. They chose instead to use the Commission's recognition of Grand Central as a landmark—a fact so patent that even appellants do not dispute it—as a vehicle to undermine the entire Landmark Preservation Law, taking an archaic and discredited extreme view of substantive due process invalidating reasonable economic regulation under the police power which this Court has consistently rejected since the mid-thirties.

Ironically, the result sought by appellants, the annihilation of the City's authority to preserve the architectural landmarks which constitute its heritage and urban distinction, as applied to one of the most priceless of those landmarks, would in a short time reduce the very property values which appellants extol above all public considerations. Appellants' true position, for all their insistence on the rights of the property owner, is, in Othello's words, that of one seeking to throw away a jewel richer than all his tribe.

### Summary of Argument

The New York appellate courts properly held that the designation of Grand Central as an architectural landmark and rejection of the Penn Central's plan to place a skyscraper astride it were well within the broad discretion afforded the municipality under the police power. The state courts found as a fact that the owner was in fact earning a reasonable return on the building. That, coupled with the city's specific offer of transferred development rights, fully satisfied the requirements of due process on this record.

Appellants would now segregate their air rights from the worth of the structure itself and contend the "confiscation" of these separate air rights mandates payment. In fact the air rights are part and parcel of the value of the building. Unlike the inverse condemnation cases relied on by appellants, *Griggs v. Allegheny County*, 369 U.S. 84, and *United States v. Causby*, 328 U.S. 256, they retain full and unhampered use of their present property, which earns a reasonable return, as the state courts found. Under the police power no more is required.

There has been no "taking" here. The municipality has broad discretion to determine land use within its own confines, upheld repeatedly by this Court even against right of

privacy, First Amendment and racial discrimination claims which the Court has consistently held entitled to far more weight than the purely economic considerations here voiced. See, e.g. *Village of Belle Terre v. Boraas*, 416 U.S. 1; *Young v. American Mini Theatres*, 427 U.S. 50.

Despite appellants' distortion of this case it is not an eminent domain case. The city has "taken" nothing in the Fifth Amendment sense. It has restricted appellants' use of the property as have municipalities in numerous zoning and other land-use decisions, limiting certain options and providing others in return. So long as appellants continue to be able to earn a reasonable return on their property as an entity—an issue resolved in the City's favor below and not before this Court—there is no constitutionally-proscribed "taking," any more than there would be where one is denied the right to erect a factory or skyscraper in an area otherwise zoned, or on a wetland or other legally protected area.

Finally, the claim of discrimination and the analogy to "spot zoning" are faulty. Landmarks need not be geographically contiguous to be protected. The city has a reasonable, comprehensive plan to protect landmarks within its jurisdiction. Unless utterly irrational this economic classification is constitutionally valid, *McDonald v. Board of Election Com'rs*, 394 U.S. 802.

## ARGUMENT

**The City's determination denying Penn Central's application to build a skyscraper atop Grand Central Terminal, a classified architectural landmark, was a valid exercise of its broad power to prevent unsuitable land use, and abridged no constitutionally protected right of the appellants.**

### A.

This is not an eminent domain case. Appellants own a building and have owned it for decades. They never sought to construct an office building above it until after it had been declared an architectural landmark by the City. Further, the Penn Central failed to even challenge the City's determination which it now so strenuously opposes until a year later when its skyscraper proposal was denied approval. The air rights of which appellants speak as if they were a separate parcel are no more than an integral part of the property which the state courts expressly found was earning a reasonable profit. The Penn Central is like any other landowner whose right to build to the sky has been curtailed. This is, as this Court has held consistently, a restriction consistent with the municipality's wide discretion under the police power. As the Court recently expressed it in *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 (n.8),

"By its nature, zoning 'interferes' significantly with owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his capacity is insufficient to invalidate a zoning ordinance \* \* \*.'"

Appellants attempt to overlook these fundamental principles, firmly part of our law since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, by seizing on the observa-

tion of Chief Judge Breitel below that "[t]his is not a zoning case" (J.S.A. 5a). But for the purposes of the police power this is a distinction without a difference. The constitutional question with any municipal land-use regulation is whether it is a rational control that does not effectively render the property worthless. *Steel Hill Development Co. v. Town of Sanbornton*, 469 F. 2d 956, 963 (5th Cir. 1972). On this record appellants totally failed to prove a violation of that rule. See *Young v. American Mini Theatres, supra*, 427 U.S. 50, 78:

"The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage."

The broad power of the municipality to control land use within its borders has been noted by this Court on countless occasions, even as against claims of First Amendment deprivations to which this Court has ever been keenly alert, and which are totally absent here where the statute's impact is of an economic nature only.

In *Village of Belle Terre v. Boraas, supra*, 416 U.S. 1, the ordinance was challenged as violative of the residents' freedom of association and right of privacy. This Court upheld it despite its conceded strong economic impact on existing property values—totally absent here where the only serious claim is of reduction of the value of unused air rights appurtenant to an existing profitable building. The Court held (p. 9):

"Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their

place; it is obvious that the scale of rental values rides on what we decide today."

Justice Marshall's dissent in *Belle Terre*, based on freedom of association, took the same broad view of the municipality's power to regulate land-use (p. 13):

"[D]eference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms."

With extraordinary pertinence here, he described land-use regulation (*id.*) as perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

Similarly, in *Young v. American Mini Theatres, supra*, the Court sustained Detroit's ordinance curtailing "adult" theatres and bookstores as against a claim of denial of free speech, in the ambit of constitutional rights far higher on the scale of protection, as this Court has over and over again held, than those here involved. *Dombrowski v. Pfister*, 380 U.S. 479; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 44; *United States v. Carolene Products*, 304 U.S. 144, 152.

*Goldblatt v. Town of Hempstead*, 369 U.S. 590, is also instructive here. There the Court held (p. 592):

"Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's

police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."

*Goldblatt* carries us much further than we need go here, for in that case the law halted an ongoing profitable use. There has never been a decision of this Court, or of any state appellate court of which we are aware, holding that a municipality may not, by legislation for a valid purpose, restrict an owner's right to build to a height greater than the law permits.

#### B.

Appellants' attempt to finesse these basic rules by arguing that the Landmark Preservation Law is arbitrary, and the equivalent of spot zoning, does not withstand scrutiny. The purpose of New York City's landmark-protection legislation is the safeguarding of the buildings the Commission finds, after public hearings, to be landmarks. Whether, as in some smaller cities, these buildings are contiguous in a district, or whether as in New York or Boston they are at various locations, does not alter the aim of the legislation. Spot zoning is by definition the absence of any comprehensive plan. Here there is not only a statutory comprehensive plan (J.S.A. 25a) to protect architectural and historic landmarks but an explicit legislative finding in the statute as to the importance of this purpose for the City's economic well-being and future. It would be anomalous and indeed discriminatory to argue that the buildings in the historic districts of Greenwich Village and Brooklyn Heights are entitled to protection under the Constitution but that Grand Central is not. Yet that is where appellants' argument leads.

The analogy with discriminatory spot zoning amounts to a claim that this—and any other—legislation protecting individual landmarks is a denial of equal protection. Under basic principles economic regulatory legislation is

to be sustained as against such claims unless the legislative classification is totally irrational. *McDonald v. Board of Election Com'rs, supra*, 394 U.S. 802. Where, as here, the statute contains express criteria for designating a landmark and provisions for public participation and judicial review, and where the Penn Central did not even contest the designation, such a contention is a make-weight. See *City of Highland Park v. Train*, 519 F. 2d 681 (7th Cir. 1975), sustaining municipal approval of a shopping center complex as against equal protection claims by nearby residents, and holding (p. 697):

"Zoning is not rendered unconstitutional by the fact that any direct benefit the plaintiffs may receive from it is less than the possible burdens it may impose upon them."

As one might expect, the courts in sustaining landmark protection laws have not discriminated between those in districts and those which are not. The recent *Maher v. City of New Orleans*, dealing with a protected district, the French Quarter, held, 516 F. 2d 1051, 1065:

"The Supreme Court repeatedly made clear that an ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential."

*Matter of Sailors' Snug Harbor v. Platt*, 29 A D 2d 376, 288 N.Y.S. 2d 314, *supra*, and *Manhattan Club v. Landmarks Preservation Commission*, 51 Misc 2d 556, 273 N.Y.S. 2d 848 (Sup. Ct. N.Y. Co. 1966), both sustained Commission determinations as to buildings not in a historic district. In the former (29 A D 2d at 377) the Court held "no longer arguable \* \* \* the right, within proper limitations, of the State to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community." See also *First Pres-*

*byterian Church of York v. City Council*, 360 A. 2d 257, 25 Pa. C. 154 (1976), upholding a landmark ordinance as against a tax-exempt corporation located in a historic district, and noting that the test is whether the act precludes the use of the building for any purpose for which it is reasonably adapted.

Appellants' radical view of substantive due process would throw into reverse gear this entire process of safeguarding these irreplaceable facets of our heritage. The narrow grudging view of the police power they espouse and the enshrinement of the right of the property owner to maximize his profits at the expense of all other values are a throwback to the days of *Lochner v. New York*, 198 U.S. 45, and similar cases. In that case Justice Holmes, dissenting, trenchantly observed (at p. 75) that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Nor did it enact the views of the commentators cited by appellants on the appropriateness of one or another form of landmark protection. As this Court has consistently held, the wisdom of state and municipal statutes in the economic field is not for the courts. *Ferguson v. Skrupa*, 372 U.S. 726; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156. Appellants are not constitutionally guaranteed the right to obtain the maximum profits from their land to the exclusion of all other considerations. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424; *Breard v. City of Alexandria*, 341 U.S. 622, 632. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58; *Dean v. Gadsden Times Publishing Corp.*, 412 U.S. 543, 544. "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168.

There is no more appropriate area for state and municipal legislation than that of local land-use, as to which

"deference should be given to governmental judgments" regarding "the most essential function performed by local government, . . . one of the primary means by which we protect . . . quality of life." *Village of Belle Terre v. Boraas*, *supra*, 416 U.S. 1, 13, 15 (MARSHALL, J., dissenting). Under these time-honored principles the state courts properly sustained the statute's application here.

### C.

Recognizing the extreme nature of their position, appellants seek to paint this case as one in which a different rule for landmarks is established. But that is not the case. The City's law is valid under the traditional police power rules within which this Court has steered for decades. Once it is proven that the owner is capable of earning a reasonable return, constitutional inquiry as to an economic regulation ends. Appellants' assertion (Br. p. 8, n. 7) that "Penn Central presented substantial evidence that it could not earn . . . a reasonable return" is fantastic. The New York courts expressly found as a fact that Penn Central failed to show Grand Central was incapable of producing a reasonable return (J.S.A. 10a-11a, 13a, 24a-25a), in addition to the immensely profitable Hotel Biltmore and other surrounding properties owned by it, whose profits are augmented by proximity to Grand Central.

Likewise, appellants' portrayal of this as a "taking" case, as if it were eminent domain, is unwarranted and misleading. The New York courts found to the contrary (J.S.A. 5a, 12a), and even in the eminent domain context the firmly established rule is that all benefits and injuries should be considered in relation to an owner's property as a whole and not solely in relation to the part taken. This Court has stressed the necessity of deducting benefits to a landowner's remaining land in any calculations to estimate compensation, "even if the result should be to leave nothing payable to the owner." *Bauman v. Ross*, 167 U.S. 548, 568. The Court there recognized that compensation should be in

part determined by what has been gained by a landowner because of the interests of the public (p. 570):

“Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual.”

See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-151. Here, appellants' other property in the same vicinity has increased in value not only because of the availability of transferred development rights but also because of their proximity to the terminal and the wealth of transportation connections, all publicly subsidized, which converge there.

Despite appellants' reliance on *Bauman v. Ross*, *supra*, they nevertheless insist on trying to separate the “taking of their air rights” from consideration of the worth of their property as a whole. However, the landmark statute's definition of the parcel designated as a landmark, termed an “improvement parcel,” specifically includes the unimproved as well as the improved portions of such property so long as it is treated as a single entity for the purposes of levying real estate taxes (J.S.A. 79a). Under this definition, the undeveloped air rights above Grand Central are clearly inseparable from the Terminal building, as they have never been treated as a distinct entity for such tax purposes. Penn Central cannot reap the rewards of years of tax assessment of Grand Central, including the undeveloped areas of the property, as a single entity, and now argue that there have always been *two* entities, separating the developed portion of the site from the undeveloped air rights.

Further, the cases cited by appellants do not support their contention that a taking of air rights should be considered in isolation to determine compensation. Both *United States v. Causby*, *supra*, and *Griggs v. Allegheny County*, *supra*, involved airplane flights over property

which were at such a low altitude they destroyed the present utility of the underlying property. These flights were judged to be takings not because of any interference with the plaintiffs' “air rights” but because in the former case, the frightening noise and glaring lights of the planes economically destroyed what had previously been a productive chicken farm, and in the latter case, they rendered residential property uninhabitable by the noise and danger of the low-flying planes, some of which had crashed in the vicinity. In contrast, it would be ludicrous for Penn Central to claim it has been prevented in any way from continuing its present usage of the Terminal by its designation as a landmark.

The remaining case cited by Penn Central for the proposition that it should be compensated is similarly inapposite. In *United States v. 29.28 Acres of Land in Wayne Township, New Jersey*, 162 F. Supp. 502 (D.N.J. 1958), the Government was required to pay only nominal fees for line-of-sight easements, and this *de minimis* compensation was in proportion to the number of trees on the property that had to be “topped.” There is nothing in that decision to support appellants' claim that the owners there had to “substantially restrict their rights to develop the property” (Br. p. 16); in fact, the court explicitly noted that the “cloud” on the property titles was only theoretical, and that at least one of the properties had actually increased in value. Yet appellants rely on that case here where they are demanding exorbitant compensation for a “loss” that has required absolutely no physical destruction or interference with any structure on their property.

#### D.

Appellants make much of the reference by the Court of Appeals to the public subsidies and tax abatements awarded the Penn Central over recent years, as well as the publicly operated subway lines which converge at Grand Central and add to its value. The disposition of this case

would be the same were these factors not considered. Indeed, the Appellate Division sustained the validity of the application of the landmark law to the building, without addressing any of those elements, on the inability of the railroad to prove it could not earn a reasonable return. This is the nub of the case and the reason why so much of appellants' argument is academic here. Under basic principles this Court need not, and therefore should not, decide the rights of one found as a fact to be able to earn a reasonable return on his investment. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (BRANDEIS, J., concurring); *United States v. Raines*, 362 U.S. 17, 21-22; *Bowen v. United States*, 422 U.S. 916, 920.

Moreover, the reasoning supplied by the Court of Appeals as an alternative to its holding that proof was wanting was fully valid. Appellants offer no reason why the courts should blind themselves to the publicly-financed advantages furnished the Penn Central, in contrast to ordinary landowners, which distinguishes it utterly from the owners of rural property and family homes in the cases on which it relies. The fact is that the test used by the Court of Appeals was the standard test used in this area—was the property capable of earning a reasonable return? The finding that it was is conclusive here.

In this connection, appellants' reliance on *United States v. Fuller*, 409 U.S. 488, is strange. In that case, an eminent domain case, the Government was held *not* required to pay for the value of the landowner's permit to graze on adjacent Government land, which the Court described (p. 491) as "a value which the government itself created and hence in fairness should not be required to pay." It is difficult to see how that case furnishes authority for the appellants' views. At most, dicta in that case allude to "the value added to property by a completed public works project, for which the Government must pay" (*id.* 492). But here the benefits conferred on the Penn Central were

totally different—tax abatements, subsidies and the like, all far more similar to the permit held not properly part of the value of the land.

Finally, it should be noted that, as the appellees' brief points out, even were the ordinance ruled to be unconstitutional—a claim which the state courts found appellants fell far short of satisfying their heavy burden of proving—that would not warrant the conclusion that a compensable taking occurred. See *Fred F. French Investing Co. v. City of New York*, 39 N Y 2d 587, 350 N.E. 2d 381 (1976), app. dismissed for want of substantial federal question, 429 U.S. 990; *Pope v. City of Atlanta*, 418 F. Supp. 665 (N.D. Ga. 1976).

The appellant Penn Central's inability to prove itself incapable of earning a reasonable return, found as a fact by the state appellate courts, removes the constitutional dimension from this case. The last-ditch attempt to portray this as an eminent domain case blatantly ignores the factual findings below and forty years of decisions broadening the police power of the municipalities, notably in the land-use area. The anachronistic view of the police power asserted by appellants would subvert state and local government legislation protecting historic landmarks as well as a host of other ordinances regulating the use of land and buildings. It does not deserve judicial sanction.

**CONCLUSION**

**The order of the Court of Appeals should be affirmed, or in the alternative the petition should be dismissed.**

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Respectfully submitted,

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